160 U.S. 303

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Obj 1. 160-303

RECORD, CASE No. 14,919.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892

TERM No., ~~1445~~ 974 ~~670~~ 33966

WILLIAM HAWS, HEBER TIMOTHY, EDWARD W. KEITH, ET AL., APPELLANTS,

vs.

THE VICTORIA COPPER MINING COMPANY.

APPEAL FROM THE SUPREME COURT OF TERRITORY OF UTAH

FILED OCTOBER 31, 1891.

THE LAW ASSOCIATION —OF— PHILADELPHIA.

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INDEX.

	Original.	Print.
Transcript from district court	1	1
Complaint	1	1
Answer to complaint	11	5
Cross-complaint	16	8
Answer to cross-complaint	20	9
Findings of fact	25	11
Conclusions of law	31	15
Judgment	33	15
Notice of intention to move for new trial	36	16
Affidavit of Charles W. Bocker	38	17
Thomas F. Thomas	40	18
Henry Cunnington	42	19
E. W. Keith	43	20
Frank Keith	45	21
Michael E. Smith	47	22
John Connors	49	23
N. A. Robertson	51	24
Statement on motion for new trial	53	24

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 1, 1891.

	Original.	Print.
Testimony for plaintiff:		
Testimony of L. R. Dyer	53	25
William Shaw	63	30
William C. McLaughlin	68	32
William Donoher	73	35
Andrew Johnson	81	39
Richard Pope	84	41
E. A. Ferguson	85	41
C. A. Dodge	87	42
Adolph Jessen	88	43
Exhibit 4—Letter of Haws to mining company, June 9, 1889	89	44
Testimony for defendants:		
Testimony of William Haws	80	44
Frank Keith	93	45
William Haws (recalled)	94	46
Heber Timothy	100	49
J. N. Barr	104	51
C. W. Bocker	108	53
Richard Pope	111	54
William Thomas	117	57
Benjamin Heater	118	58
R. R. Campbell	119	58
L. V. Shurtliff	121	59
E. C. Norris	122	59
Frank Keith (recalled)	123	60
Samuel Whitall	124	60
Testimony for plaintiff in rebuttal	125	61
Testimony of Lewis R. Dyer	125	61
August Bohn	125	61
Notice, &c.	128	63
Specification of particulars	130	63
Assignment of errors	132	65
Settlement of statement	135	66
Exhibit C—Dyer's notice of claim, September 17, 1887	135	66
D—Dyer's notice of claim, September 17, 1887	135	66
3—Map	136	66
Order overruling defendants' motion for new trial	136½	67
Notice of appeal to supreme court of Utah	137	67
Undertaking on appeal	138	68
Certificate of attorneys to transcript	152	70
Submission	153	70
Judgment	153	70
Allowance of appeal and order fixing bond	154	70
Opinion	155	71
Citation	159	72
Prayer for appeal and transmission of record	160	73
Bond	161	74
Affidavit of value	164	75
Assignment of errors and prayer for reversal	165	76
Certificate of trial, objections, &c.	170	78
Certificate of clerk	180	84

1 In the District Court of the First Judicial District, Territory of Utah.

THE VICTORIA COPPER MINING COMPANY, a Corporation, Plaintiff,
vs.
WILLIAM HAWS, HEBER TIMOTHY, EDWARD W. KEITH, FRANK A. Keith, Samuel R. Whitall, William V. R. Whitall, and Michael E. Smith, Defendants.

The complaint of the above-named plaintiff respectfully shows to the court and alleges—

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois for the purpose of mining copper ore, transporting and selling the same, and for the purchase and procurement of mines and lands necessary for the transaction of its business.

Plaintiff further alleges that on the 17th day of Sept., 1887, one Lewis R. Dyer, being a citizen of the United States, went upon the public domain of the United States, theretofore wholly unoccupied and unclaimed, and located on said day two certain mining
2 claims situated in the county of Uintah and Territory of Utah.

That afterwards, on the same day, said Dyer duly marked the boundaries of said mining claims and locations and each of them and duly posted notices thereof on said locations and each of them at the respective placrs of discovery; which said notices were thereafter duly recorded in the office of the county recorder in and for the said county of Uintah.

That said Dyer fully complied with all the laws of the United States and of the Territory of Utah and the local rules and regulations in said mining district.

That said mining claims were by their said locators, Lewis R. Dyer, named respectively "Antietam lode" and "Copper the Ace" lode, and described more fully and particularly as follows, to wit:

The Antietam Lode mining claim begins at the point of discovery, on the northeast side of the stump of the tree on which the original notice of the Antietam lode was posted, where a post is now set, and running thence with magnetic courses 27 degrees east 300 feet to post number one; thence north 72 degrees 20 minutes west 1,500 feet to post number two; thence south 27 degrees west 600 feet to post number three; thence south 72 degrees 20 minutes east 1,500 — to post number four; thence north 27 degrees east 300 feet to the place of discovery—

The aforesaid place of beginning, from which the Antietam discovery shaft, seven feet deep, bears north 27 degrees west
3 thirteen feet distant, and the mouth of the main tunnel, 230 feet long, bears north 26 degrees 30 minutes east 219 feet distant.

The Copper the Ace Lode mining claim begins at the point of discovery, which is marked by a post, from which a shaft about sixty

feet deep bears south 40 degrees east 10 feet distant, and the mouth of the main tunnel, 230 feet long, bears north 26 degrees 30 minutes east 219 feet distant, running thence with magnetic courses north 27 degrees east 300 feet to post number one; thence south 71 degrees 10 minutes east 1,500 feet to post number two; thence south 27 degrees west 600 feet to post number three; thence north 71 degrees 10 minutes west 1,500 feet to post number four, and thence north 27 degrees east 300 feet to the aforesaid place of discovery.

Plaintiff further shows that from the said 17th day of September, 1887, until the ouster hereinafter complained of, the said locator, Lewis R. Dyer, and his grantees remained continuously in possession of said mining claims and each of them, working and mining thereof, and have expended thereon upwards of eight thousand dollars.

Plaintiff further alleges and shows that it is now and ever since the 25th day of May, 1888, has been the owner of said mining claims above described and each of them (except as against the paramount title of the United States) by location and purchase and is now entitled to the quiet, peaceable, and exclusive possession thereof by virtue of the full compliance with the laws, rules, and regulations and customs hereinbefore set forth, and that said plaintiff and its grantors have worked and mined said mining claims and each of them from said 17th day of September, 1887, up to the time of the wrongful and unlawful acts of the defendants hereinafter set forth, and that said plaintiff has done more than one hundred dollars' worth of work on each of said mining claims during the calendar year of 1888, and also during the calendar year of 1889.

Plaintiff further alleges that while it was in the quiet, peaceable, and undisturbed possession of said mining claims and each of them and every part thereof the said William Haws and Heber Timothy wrongfully and unlawfully and without right or authority and without the consent and against the will of the plaintiff, to wit, on or about the 10th day of June, 1889, entered upon said described premises and mining claims so located and worked by plaintiff and its grantors aforesaid and wrongfully and unlawfully ousted the plaintiff therefrom, claiming the said mining claims of said plaintiff and wrongfully excluding plaintiff and its agents and servants from the possession thereof.

And plaintiff further alle-es that said defendants, William Haws and Heber Timothy, or their said grantors, the other defendants herein, have, ever since said 10th day of June, 1889, wrongfully and unlawfully withheld the possession from plaintiff of said mining claims and each of them, and are still wrongfully and unlawfully withhold-ng possession of the same from the plaintiff, and that since on or about the first day of August, 1890, said defendants have been working said mining claims and extracting ore therefrom and shipping lar-e quantities of ore taken and extracted from said mining claims without the consent of plaintiff, to the damage of plaintiff in the sum of twenty-five thousand dollars.

For equitable relief pending the above action and for a further cause of action plaintiff shows—

That said William Haws was a trusted employee of plaintiff and its grantors, working on plaintiff's said mining claims; that said Haws so worked for plaintiff and its grantors from the 11th day of February, 1888, until some time in the month of August, 1888, and again resumed work in the month of March, 1889, and continued to work for this plaintiff up to and including the first day of June, 1889.

Plaintiff further alleges upon information and belief that said defendant, William Haws, while at — for the plaintiff, as aforesaid, secretly and wrongfully conspired and combined with the said defendant, Heber Timothy, who is a relative of said Haws, to oust this plaintiff from the possession of its aforesaid mining claims and wrongfully appropriate the same to themselves; that said Timothy had knowledge and notice of all the facts hereinbefore stated and acted wholly at the instigation and direction of said Haws.

6 That in aid of the aforesaid wrongful design and purpose of said William Haws to oust the plaintiff from the possession of said claims, as aforesaid, said William Haws and Heber Timothy, on or about the 7th day of June, 1889, made a pretended relocation of said Antietam lode and called it by the name of Scottish Chief, and on the last-mentioned day said William Haws also made a pretended relocation of said Copper the Ace Lode mining claim and called it the Ontario mine.

That thereafter, in pursuance of said wrongful intention and design and pretending to act by virtue of said so-called relocations, said William Haws wrongfully took possession of said claims on the date aforesaid, and wrongfully and unlawfully excluded the plaintiff from the same and forcibly held the possession of the same.

That thereafter, and on or about the 12th day of Sept., 1889, said Heber Timothy, at the instigation and request of said Haws, to further their aforesaid wrongful design and purpose, made a pretended mining location of what he called the Valao mine; that said pretended location so made embraces substantially the same ground covered and included by said Antietam lode; also that on said last-mentioned date, for the purposes aforesaid, said Timothy made a pretended mining location and called it Copper King; that said pretended location so made embraces substantially the same ground covered by said Copper the Ace mining claim.

7 Plaintiff further alleges that on or about the 9th day of August, 1890, and after plaintiff had commenced to take active measures for the purpose of regaining possession of its aforesaid mining claims said defendant William Haws, to further accomplish his aforesaid unlawful design and purpose, by an instrument in writing, under his hand and seal, pretended to convey to said Heber Timothy the so-called Schottisch Chief and Ontario Lode mining claims aforesaid, and thereupon and on the same day and for the same purpose said Heber Timothy, by an instrument in writing, under his hand and seal, pretended to convey to said defendant Michael E. Smith the aforesaid so-called Scottisch Chief

and Ontario mining claims, which are described in said instrument as follows, to wit:

"The Schottisch Chief and Ontario Lode mining claims, located June 7th, 1889, and relocated September 12th, 1889, as the Copper King and Valao lode claims, situated in the Carbonate mining district, in the county of Uintah and Territory of Utah."

That thereafter and in pursuance of said preconceived design of wrongfully keeping plaintiff from the possession of its aforesaid mining claims and on the 11th day of August, 1890, said Michael E. Smith, by an instrument in writing, under his hand and seal, attempted and pretended to convey to said defendant- Samuel R. Whitall, Wm. V. R. Whitall, Edward Keith, and Frank A. Keith, in consideration of the sum of one dollar, an undivided one-half interest in the so-called Valao and Copper King mining claims aforesaid.

8 Plaintiff further alleges that on or about the 22nd day of July, 1890, it demanded possession of said mining claims from the said defendant Haws, who was in possession of the same; and thereafter, on or about the 28th day of August, 1890, plaintiff demanded possession of the said mining claims of the defendant Edward A. Keith, who was then in possession of the same, for and on behalf of the defendants herein; that both of said demands were refused.

Plaintiff further alleges and upon information and belief *and* charges the fact to be that the said defendants have no property in this Territory not exempt by law from execution and sufficient to satisfy the claim of the plaintiff herein, and that the defendants Frank A. Keith, Edward W. Keith, and Michael E. Smith are non-residents of this Territory; that the defendant S. R. Whitall is an officer in the United States Army, and that the defendant Edward V. R. Whitall is a son of the defendant Samuel R. L. Whitall, and that his place of residence is unknown to plaintiff, and unless restrained and enjoined from working plaintiff's said mining claims and each of them and from extracting ore therefrom and from shipping, disposing, or *or* selling the same the plaintiff will suffer great and irreparable damages and loss.

Wherefore plaintiff prays the judgment of this court against the said defendants:

First. For possession of the said Antietam Lode and Copper the Ace Lode mining claims.

9 Second. For the sum of twenty-five thousand dollars, damages, for withholding the possession of the same, together with the costs of this action.

Third. For an injunction against the said defendants enjoining and restraining the said defendants and each of them from interfering with the plaintiff in the possession of the said mining claims and from extracting and removing ore therefrom and from shipping, selling, or disposing of the same by them removed therefrom.

CHAS. C. DEY,
Pl'ff's Att'y.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

Auguste Bohn, Jr., being duly sworn, says that he is the secretary of the plaintiff, The Victoria Copper Mining Company, and makes this verification for and on behalf of the said corporation; that he had read the above and foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

AUGUSTE BOHN, JR.

Subscribed and sworn to before me this 6th day of September, 1890.

C. B. JACK,
Notary Public.

[SEAL.]

10 Endorsed: 1480. 8758. District court 1st judicial dist. Victoria Copper M'g Co., pl'ff, *vs.* Wm. Haws *et al.*, deft's. Complaint. Filed Sept. 6, 1890. C. H. McClure, by B. Bachman, Jr. Chas. C. Dey, pl'ff's att'y. Filed Oct. 8, 1890. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy.

11 TERRITORY OF UTAH, }
Salt Lake County. }

In the District Court of the Third Judicial District.

THE VICTORIA COPPER MINING COMPANY, a Corporation, Plaintiff,
vs.
WILLIAM HAWS, HEBER TIMOTHY, EDWARD W. KEITH, FRANK A. Keith, Samuel R. Whitall, William V. R. Whitall, and Michael E. Smith, Defendants.

Now come said defendants and for answer to the plaintiff'- complaint allege that they have no information or belief sufficient to enable them to answer the following allegations of said complaint, to wit: 'That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois for the purpose of mining copper ores, transporting and selling the same, and for the *purpose* and procurement of mines and lands necessary for the transaction of its business."

Plaintiff further alleges that on the 17th day of Sept., 1887,
12 one Lewis R. Dyer, being a citizen of the United States, went upon the public domain of the United States theretofore wholly unoccupied and unclaimed, and located on said day two certain mining claims situated in the county of Uintah, in the Territory of Utah; and, placing their denial on that ground, defendants deny that the plaintiff is a corporation duly or at all organized under or by virtue of the laws of the State of Illinois or of any State or at all for the purpose of mining copper ore or for any other purpose, or that it is authorized for that or any purpose to procure

mines or lands; and defendants deny that on the 17th day of September, 1887, or on any other day or at all Lewis R. Dyer was a citizen of the United States or went upon the public domain of the United States theretofore unoccupied or unclaimed or at all or located on the said day or any day any mining claims or mining claim situated in the county of Uintah and Territory of Utah or elsewhere.

And defendants deny that on the same day or on any other day said Dyer duly or at all marked the boundaries of said mining claims and locations or of any mining claim or location or duly posted notices thereof or any notices thereof on said or any location at the respective places of discovery or elsewhere, or that there was any place of discovery on said alleged locations, or that the notices so posted or copies thereof were ever recorded in the office of the county recorder of Uintah county, and deny that said Dyer
13 fully or at all complied with all or any of the laws of the United States or the Territory of Utah or with all or any of the local rules or regulations in said mining district, and deny that the said Lewis R. Dyer ever located the said claims described in the plaintiff's complaint or any portion thereof, or that the said Antietam lode had any point of discovery, or that it was on the northeast side of the stump of a tree, or that the original location notice thereof was posted thereon; and deny that the said alleged Antietam claim had any discovery shaft thereon seven feet deep or of any depth; and deny that the alleged Copper the Ace mining claim had any point of discovery thereon, or that it is marked by a post, or that therefrom a shaft about 60 feet deep bears south 40 degrees east 10 feet distant or any shaft of any depth bears in any direction therefrom at any distance.

And defendants deny that from the 17th day of September, 1887, or from any date or at all the said Lewis R. Dyer or his grantees remained in the possession of said alleged mining claims or either of them or working or mining therein, but defendants admit that the said Dyer during a portion of said time had actual possession of certain portions of the premises now described as said mining claims; and defendants deny that plaintiff is now or ever since the 25th day of May, 1888, has been or ever has been at any time the owner of said alleged mining claims described in the complaint except as against the paramount title of the United States or
14 otherwise, or that it is now in the peaceable, quiet, exclusive, or undisturbed possession thereof or in any possession thereof, or that it has ever complied with the laws, rules, regulations, or customs referred to in said complaint; and denies that the plaintiff or its grantors have worked or mined said alleged mining claims or either of them from the 17th day of September, 1887, up to the day of any wrongful or unlawful acts of any of the defendants herein; and defendants deny that whi-e the plaintiff was in the peaceable or undisturbed possession of said alle-ed mining claims or of either of them or of any part thereof said defendants William Haws and Heber Timothy or either of them wrongfully or unlawfully or without right or authority, on or about the 10th day

of June, 1889, or at any day or date, entered upon said described premises or mining claims and wrongfully or unlawfully ousted the plaintiff therefrom or wrongfully excluded the plaintiff or its agents or servants from the possession thereof.

And defendants deny that the said defendants William Haws and Heber Timothy and the other defendants herein or any of them have ever wrongfully or unlawfully withheld the possession from the plaintiff of said alleged mining claims or of either of them or still wrongfully or unlawfully withhold the possession thereof from the plaintiff, or that plaintiff has been damaged by any acts of the said defendants or of any of them in the sum of twenty-five thousand dollars or in any sum whatsoever; and defendants deny
15 that William Haws was ever a trusted employé of plaintiff or of its grantors, and deny that while William Haws was at work for the plaintiff he secretly or wrongfully or at all conspired or combined with defendant Heber Timothy or any one else to oust the plaintiff from the possession of the aforesaid mining claims or either of them or to wrongfully appropriate the same to themselves; and defendants deny that said Timothy had any knowledge or notice of the matters alleged in plaintiff's complaint, or that *that* the same were at any time facts, or that he acted at the instigation or direction of the said Haws; and defendants deny that in aid of the said wrongful design or purpose of said Haws to oust the plaintiff from the possession of said claims said Haws and Timothy did any act whatsoever at any time, or that in pursuance of said or any wrongful intention or design the said Haws wrongfully took possession of said claims on the date alleged or any date or wrongfully or unlawfully excluded the plaintiff from the same, and deny that the said Haws ever for-ibly held possession of the same, and deny that the Valao mine as located by the said Heber Timothy substantially or at all covers the ground covered by or included in said Antietam lode, or that any ground was covered by or included in said Antietam lode, and deny that the said location of the Copper King lode as made by said Timothy embraces some of the ground covered by or included in the said Copper the Ace mining claim, or that any ground was
16 covered by or included in the said Copper the Ace mining claim; and defendants deny that the said Valao mine covers substantially the same ground as is described in plaintiff's complaint as included in the said alleged Antietam lode, or that the Copper King mine covers substantially the same ground described in plaintiff's complaint as Copper the Ace mining claim, and deny that the said Timothy or Haws or any of the other defendants herein have ever done any act or thing with a design or for the purpose of wrongfully keeping plaintiff out of the possession of the said alleged mining claims or either of them or of any premises; and the defendants deny that these defendants have no property in this Territory not exempt by law from execution and sufficient to satisfy any claim of plaintiff herein, and deny that the defendants Frank A. Keith or Edward W. Keith are non-residents of this Territory, or that the residence of William V. R. Whitall is unknown to the

plaintiff, or that unless said defendants be restrained or enjoined from working the said or any of the said alleged mining claims the plaintiffs will suffer great or irreparable damage or loss or any damage or loss whatsoever.

As a cross-complaint herein against the plaintiff, the defendants Edward R. Keith, Samuel R. Whitall, William V. R. Whitall, and Michael E. Smith allege that they are now and for a long time hitherto have been the owners (subject only to the paramount title of the United States), in the possession, and entitled to the pos-
17 session of those certain premises situated in the Carbonate mining district, in Uintah county, Territory of Utah, and bounded and particularly described as follows, to wit: Commencing at post No. 2 of the Valao mining claim, from which United States mineral monument No. 1 of said Carbonate mining district bears north 41 degrees 26′ west 159.1 feet distant, and thence running north 38 degrees 32′ east 600 feet to post No. 3 of said claim; thence south 50 degrees 41′ east 3,000 feet to post No. 3 of the Copper King lode and mining claim; thence south 38 degrees 22′ west 600 feet to post No. 2 of said Copper King lode and mining claim; thence north 50 degrees 41′ east 1,500 feet to post No. 1 of said Copper King lode and mining claim; thence north 38 degrees 22′ east 20.7 feet to post No. 1 of said Valao mining claim; thence north 51 degrees 29′ west 1,500 feet to said post No. 2 of said Valao mining claim, the place of beginning; and also of all veins, lodes, and ledges throughout their entire depth the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said mining claims, but only such portions of such veins or ledges are so claimed, owned, and possessed by said cross-complainants as are included between vertical planes drawn downwards through post No. 2 and post No. 3 of said Valao lode and mining claim and post No. 3 and post No. 2 of said Copper King lode and min-
18 ing claim, such vertical planes being continued in their own direction, so as to intersect such exterior parts of such veins, lodes, or ledges; that the said cross-complainants claim title in fee to said premises (subject only to the paramount title of the United States), and the said plaintiff in this suit claims an estate or interest therein adverse to cross-complainants; that the claim of said plaintiff is without any right whatever, and that it has not any estate, right, title, or interest in said land or premises or in any part thereof or in the lodes or ledges the tops or apexes of which lie within the said surface lines.

Wherefore the said cross-complainants herein pray that the plaintiff may be required to set forth the nature of its claim, and that all adverse claims of the said plaintiff may be determined by a decree of this court; that by said decree it be declared and adjudged that the plaintiff has no estate or interest whatever in or to said land or premises, and that the title of cross-complainants is good and valid; that the plaintiff be forever enjoined and debarred from asserting any claim whatever in or to said land or premises adverse to the

said cross-complainants, and for such other relief as shall to the court seem equitable, and for costs.

BENNETT, MARSHALL & BRADLEY,
Attorneys for Defendants.

19 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

Samuel R. Whitall, being first duly sworn, on his oath states that he — one of the defendants and one of the cross-complainants making the foregoing answer and cross-complaint; that he has read the same and knows the contents thereof, and the same are true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

SAMUEL R. WHITALL.

Subscribed and sworn to before me this 7th day of October, A. D. 1890.

W. M. BRADLEY,
[SEAL.] *Notary Public, Salt Lake City, Utah.*

Endorsed: 8757. 3rd dist. c't, Salt Lake Co. Victoria Copper M'g Co. *vs.* Wm. Haws *et al.* Answer. Filed Oct. 8, 1890. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy. Bennett, M. & B., for def'ts.

20 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

In the District Court of the Third Judicial District.

THE VICTORIA COPPER MINING COMPANY, a Corporation, Plaintiff,
vs.
WILLIAM HAWS, HEBER TIMOTHY, EDWARD KEITH, FRANK A. Keith, Samuel R. Whitall, William V. R. Whitall, and Michael E. Smith, Defendants.

And now comes the plaintiff herein, and for its answer and reply to the cross-complaint of the above-named defendants, William Haws, Heber Timothy, Edward W. Keith, Frank A. Keith, Samuel R. Whitall, William V. R. Whitall, and Michael E. Smith, denies that said defendants or either of them are now or for a long time hitherto have been the owners (subject only to the paramount title of the United States) or otherwise, or that they have ever been or now are the owners or entitled to the possession of the certain premises situated in the Carbonate mining district, Uintah county, Utah, particularly bounded and described in said cross-complaint,
21 or *if* any part or parcel thereof; also deny that said defendants are or ever have been owners of any veins, lodes, or ledges, throughout their entire depth or otherwise, the top or apex of which lies inside of said surface lines described in said cross-complaint or otherwise, extended downward vertically or otherwise, as alleged in said cross-complaint or otherwise.

Plaintiff further denies that said defendants or any or either of them are now or ever have been the owners of any of the veins or ledges described in said cross-complaint as included between vertical planes drawn downward through post No. 2 and post No. 3 of said so-called Valao lode and mining claim and post No. 3 and post No. 2 of said Copper King lode and mining claim or otherwise.

Plaintiff also denies that said defendants or either of them are now or for a long time hitherto have been in the possession of the premises described in said cross-complaint or any portion thereof except as hereinafter stated in that behalf. The plaintiff admits that said defendants have ever since on or about the 11th day of August, 1890, been in possession of said described premises, and alleges that said possession was wrongful and illegal and without right or authority.

Plaintiff, further answering said cross-complaint, admits that it has a claim interest in the premises described in said cross-complaint, and alleges that it is now and for upwards of two
22 years last past has been the lawful owner and entitled to the sole and exclusive possession (subject only to the paramount title of the United States) to all of said premises described in said cross-complaint which are included in the premises specifically described in the complaint of the plaintiff herein, including all of the surface included within the lines of the Antietam Lode and the Copper the Ace Lode mining claims as specifically described in the complaint of the plaintiff herein, and of all veins, ledges, and lodes throughout their entire depth the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, and ledges may so far depart from the perpendicular in their course downward as to extend outside the vertical side lines of such surface location, but only as to such outside parts of such veins or ledges or such portions thereof as lie between vertical planes drawn downward through post No. 2 and post No. 3 of said Antietam Lode mining claim and post No. 2 and post No. 3 of said Copper the Ace mining claim as the same is described in the complaint of the plaintiff herein, such vertical planes through the end lines of said location being so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges.

Further answering said cross-complaint, this plaintiff specifically denies that the claim of the plaintiff is without any right whatever, and that plaintiff has not any estate, right, title, or interest in the said land or premises or in any part thereof or in the lodes
23 and ledges the top or apex of which lie within the said surface lines.

Wherefore the plaintiff prays that the said cross-complaint of the said defendants herein be dismissed with costs.

CHAS. C. DEY,
Attorney for Plaintiff.

TERRITORY OF UTAH, } ss:
County of Weber, }

Chas. C. Dey, being first duly sworn, deposes and says that he is the attorney for the plaintiff in the above-entitled action, and that he has read the foregoing answer and reply of the plaintiff to the cross-bill of the defendants herein; that the same is true of his own knowledge except as to those matters and things therein stated on information and belief, and as to those matters he believes them to be true.

That the reason this verification is not made by said plaintiff or its officers is because said plaintiff is a corporation organized under the laws of the State of Illinois, and that it has no officer residing in the county of Weber and Territory of Utah, where deponent resides.

CHAS. C. DEY.

Subscribed and sworn to before me this 16th day of October, 1890.

SANFORD L. IVES,
[SEAL.] *Notary Public.*

Endorsed: 8757. Utah Territory, 3rd jud'l dist. Victoria Copper M'g Co. *vs.* Wm. Haws *et al.* Answer to cross-complaint. Filed Oct. 17, 1890. Henry G. McMillan, clerk.

24 In the District Court of the Third Judicial District, Utah Territory.

VICTORIA COPPER MINING COMPANY, a Corporation, Plaintiff, }
vs.
WILLIAM HAWS, HEBER TIMOTHY, EDWARD W. KEITH, FRANK A. Keith, Samuel R. Whitall, Wm. V. R. Whitall, and Michael E. Smith, Defendants. }

At a regular term of said court held in and for said district this cause came on to be heard before said court, a jury having been first waived, to wit, on the 11th day of November, 1890, and after hearing the testimony and evidence adduced and the arguments of counsel for the respective parties, and the court, being fully advised in the premises, now makes and files the following findings of fact and conclusion of law herein.

25 *Findings of Fact.*

First. That Lewis R. Dyer, the locator of the two mining claims described in the complaint herein, called respectively "Antietam lode and Copper the Ace lode," and situated in Uintah county, Territory of Utah, at and prior to the time of locating the same discovered and appropriated a mineral vein or lode of rock in place.

Second. That at the time of the discovery of said vein or lode and the location of said mining claims the land included within

the boundaries of said mining claims was public mineral land, wholly unoccupied and unclaimed.

Third. That after the discovery of said vein or lode or mineral-bearing rock in place, to wit, on the 17th day of Sept., 1887, said Lewis R. Dyer, being a citizen of the United States, located the two mining claims described in the complaint herein by writing on a tree standing at or in close proximity to the place or places of discovery of said vein or lode the two notices of location, one for each of said claims.

Fourth. That said notices each described the respective claims by references to said tree; also respectively described the boundaries of each claim by courses and distances from said tree; that each of said notices contained the name of the locator and date of location; that said tree was a sufficient natural object by which said claims and each of them could be identified.

Fifth. That soon after the writing of said notices of location and during the month of September, 1887, said Dyer
26 marked sufficiently on the ground the boundaries of said mining claims and each of them by setting suitable stakes or posts at the corners of each of said claims; also at the center of the respective side lines of each of said claims; also by writing on the stakes to identify them with reference to the respective claims and securing said stakes by stones piled around them.

Sixth. That thereafter, on the 13th day of February, 1888, said Dyer caused a copy of said location notices and each of them to be recorded in the office of the county recorder of said county of Uintah; that there was not at that time or at the time of locating said claims any mining district recorder; that said mining claims were situated in what had been known as the "Carbonate mining district;" that the rules and regulations of said mining district had long prior to the said 17th day of September, 1887, fallen into disuse and were not then or for a long time prior thereto had not been in force and effect.

Seventh. That the plaintiff is a corporation duly organized and existing under the laws of the State of Illinois, and was so organized on the 15th day of May, 1888.

Eighth. That on the 4th day of May, 1888, said Lewis R. Dyer duly transferred an equal undivided one-half of said mining claims and each of them to Edward A. Ferguson and Augusta Bohn,
27 Jr., and that thereafter, to wit, on the 28th day of May, 1888, said Lewis R. Dyer, Edward A. Ferguson, and Augusta Bohn, Jr., duly transferred and conveyed said mining claims and each of them to the plaintiff company.

Ninth. That since said 17th day of September, 1887, until the 10th day of June, 1889, said Dyer and his grantees, the plaintiff herein, continuously worked upon and improved said mining claim and each of them and actually possessed the same, and have expended in said work and improvements upward of the sum of $7,000.00; that said mining claims are contiguous to each other and were worked jointly and in common; that the work done and improvements made on said claims were such as did develop said claims

and each of them, and that for each of the calendar years of 1887, 1888, and 1889 more than one hundred dollars' worth of work was actually done on each of said claims by said Dyer and his grantee, the plaintiff herein.

Tenth. That on Sunday night, the 9th day of June, 1889, while said plaintiff was in actual possession of said claims and working the same, by its agents and employees, the defendant William Haws went upon the ground of said mining claims with two men and wrongfully took possession of the same and the working upon the same, prepared to hold such possession by force, and did wrongfully keep the plaintiff and its employees from thereafter working on said mining claims and wrongfully excluded them therefrom, and that said William Haws and Heber Timothy and their grantees, the other defendants therein, have ever since wrongfully ex-
28 cluded the plaintiff from the possession of said mining claims.

Eleventh. That prior to said 9th day of June, 1889, said William Haws was an employee of the plaintiff and its grantors working on said mining claims; that said Haws so worked from the 11th day of February, 1888, until the 13th day of August, 1888, and from October 24th, 1888, to December 21st, 1888, and again resumed work in the month of March, 1889, and continued to work for plaintiff up to and including the 1st day of June, 1889, when he voluntarily left the employ of plaintiff; that while at work for plaintiff in the year of 1888 said Haws formed the secret intention of taking possession of said mines and mining claims.

Twelfth. That on or about the 7th day of June, 1889, said Haws procured the defendant Heber Timothy to join and assist him in making a location of the ground described in the complaint herein, which was then being actually possessed and worked by plaintiff, and that on that day said Haws and Timothy, without right of entry on the ground, set sufficient stakes to mark the boundaries of the two claims, which they called "Scottish Chief" and "Ontario Mine" Lode mining claims; that they also posted on a stake placed near the place of discovery of plaintiff's aforesaid claims location notices for each of said claims; that the location notice of said "Scottish Chief" lode was signed by said Heber Timothy and William Haws and recited that the location was a "relocation" of the "Antietam" lode; that the said location notice
29 of the "Ontario mine lode" was signed by said William Haws and recited that the location was a "relocation" of the Copper the Ace.

Thirteenth. That on the 4th day of June, 1889, a mining district was organized including within its boundaries the ground heretofore described called the Carbonate district; that said Scottish Chief and "Ontario mine" location notices were recorded on the 11th day of June, 1889, in the records of said "Carbonate mining district."

Fourteenth. That on or about the 12th day of September, 1889, while holding possession of said mining claims of plaintiff aforesaid, under the wrongful entry of said Haws aforesaid, aided by said Timothy, with the consent of said Haws and at his instigation, and for the purpose of omitting the name of said Haws from the location

notices, in anticipation of proceedings being taken by plaintiff to regain possession of its said mining claims, set a discovery stake within the limits and boundaries of plaintiff's said mining locations and not far distant from the place of discovery of plaintiff's said mining claims, and then and there placed two notices of locations signed by said Heber Timothy, claiming to locate two mining claims under the respective names of Valao and Copper King, and set sufficient stakes and marks to describe and designate the boundaries of said mining locations and each of them.

Fifteenth. That said Haws was to have and own by agree-
30 ment made with said Timothy all of said Copper King and one-half of said Valao; that said claims include substantially the same ground included in and covered by plaintiff's aforesaid claims.

Sixteenth. That on the 9th day of August, 1890, said William Haws, by an instrument in writing, conveyed to the defendant Heber Timothy his interest in the Scottish Chief and Ontario mine mining claims aforesaid, and that on the same day said Timothy conveyed to the defendant Michael E. Smith the aforesaid Scottish Chief and Ontario described in said deed as relocated September 12th, 1889, as the Copper King and Valao lode claims, and that on the 11th day of August, 1890, said defendant Smith, by an instrument in writing, conveyed to the defendants Samuel R. Whitall, Wm. V. R. Whitall, Edward Keith, and Frank A. Keith an undivided one-half interest in said Valao and Copper King claims.

Seventeenth. That on or about the 29th day of August, 1890, plaintiff had its aforesaid mining claims surveyed and stakes reset that sufficiently marked the boundaries of said claims and each of them and the place of discovery; that at the place of discovery plaintiff caused to be posted, on the 29th day of August, 1890, an addendum notice to each of the original notices of location, which said addendum notices were duly signed by the secretary of plaintiff company and dated, and respectively described the claims by metes and bounds as ascertained by actual survey, and also
31 by reference to the permanent workings of the claims; that said notices were recorded in the office of the county recorder of said county of Uintah on the 29th day of August, 1890.

Eighteenth. That the description of said claims as given in said addendum notices is the same description as given in the complaint of the plaintiff herein; also that the official survey for patent of said mining claims of plaintiff was made in exact accordance with said description and the boundary stakes of said claims.

Nineteenth. That in the months of August and September, 1890, and prior to the commencement of this action, the defendants wrongfully extracted and carried away 25 tons of ore taken from plaintiff's said mining claims and sold all but 7 tons thereof for the net sum of $1,897.57, except as to the cost of hauling and extracting, amounting to $34.00 per ton.

Conclusions of Law.

1. That the plaintiff was at the time of the commencement of this action and still is the owner of and entitled to the possession of the mining claims particularly and specifically described in the complaint of the plaintiff herein and called respectively "Antietam Lode and Copper the Ace Lode" mining claims, which said mining claims and each of them were at the time of the commencement of this action and have ever since continued to be and now still are valid mining claims, embracing the premises described in the complaint herein, subject only to the paramount title of the United States.

32 2. That the defendants or any of them or any person claiming under them have no title or interest in said premises whatsoever and had none at the time of the commencement of this action.

3. That said plaintiff is entitled to a judgment or a decree against said defendant- for the possession of the "Antietam Lode" and "Copper the Ace" Lode mining claims and premises embraced therein, as described in said complaint, and confirming its title to the same, and that the defendants have no right, title, or interest in said premises or any part thereof or in the ores extracted therefrom; also that plaintiff is entitled to the 7 tons of ore removed by the defendant- and not disposed of, and also for $1,047.57 damages, and also for the sosts of this action; also enjoining the said defendants and each of them, their servants, agents, and employees and every one acting under them or any of them, *and* from extracting or removing ore therefrom.

4. That judgment be entered accordingly.

Dated Nov. 24, 1890.

By the court:

T. J. ANDERSON, *Judge.*

Endorsed: 8757. Dist. court, 3d jud'l dist., Utah. Victoria M'g Co. *vs.* Wm. Haws *et al.* Findings. Filed Nov. 24, 1890. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy.

33 In the District Court of the Third Judicial District, Territory of Utah.

THE VICTORIA COPPER MINING COMPANY, A Corporation, Plaintiff,
vs.
WILLIAM HAWS, HEBER TIMOTHY, EDWARD W. KEITH, FRANK H. Keith, Samuel R. Whitall, William V. R. Whitall, and Michael E. Smith, Defendants.

Judgment.

This cause came on regularly for trial on the 11th day of November, A. D. 1890. A trial by jury having been expressly waived by the respective parties, the case was tried before the court without a jury.

Whereupon witnesses on the part of the plaintiff and the defendant were duly sworn and examined and documentary evidence introduced by the respective parties; and the evidence being closed, the cause was submitted to the court for consideration and decision; and, after due deliberation thereon, the court files its findings of fact and conclusions of law in writing and orders a judgment to be
34 entered in favor of the plaintiff in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed that The Victoria Copper Mining Company, the plaintiff herein, recover from the defendants, William Haws, Heber Timothy, Edward W. Keith, Frank H. Keith, Samuel R. Whitall, William V. R. Whitall, and Michael E. Smith, the possession of the Antietam Lode and Copper the Ace Lode mining claims, situated in the Carbonate mining district, in the county of Uintah, Territory of Utah, and the premises embraced therein and each and every part thereof, the same being specifically described in the complaint of the complainant herein, and confirming the title to said plaintiff in and to the same.

It is further ordered, adjudged, and decreed that the said defendants have no right, title, or interest in said mining claims and premises or any part thereof or in the ore extracted therefrom; also that said plaintiff is entitled to the seven tons of ore removed by said defendants therefrom and now disposed of; also that said plaintiff do have and recover from the defendants the sum of $1,047.57 damages for ore taken from said mining claims and disposed of, together with the costs of this action, amounting to the sum of $649.60; making a total of $1,692.17.

It is further ordered, adjudged, and decreed that the said defendants and each of them, their servants, agents, and employees,
35 and every one acting under them or any of them, are hereby enjoined and restrained from extracting or removing ore therefrom.

Dated Nov. 24th, 1890.

T. J. ANDERSON, *Judge.*

Attest: HENRY G. McMILLAN, *Clerk,*
[SEAL.] By GEO. D. LOOMIS, *Deputy.*

Endorsed: 8757. 3rd dist. court, Salt Lake Co., Utah. Victoria M'g Co. *vs.* Wm. Haws *et al.* Judgment. Filed Nov. 24, 1890. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy.

36 TERRITORY OF UTAH, } *ss:*
County of Salt Lake, }

In the District Court of the Third Judicial District.

VICTORIA COPPER MINING COMPANY, Plaintiff, }
vs.
WILLIAM HAWS *et al.*, Defendants. }

To the plaintiff and to Charles C. Dey, its attorney:

You are notified that the defendants intend to and will move the

court to vacate and set aside the findings and decision herein rendered against them and in favor of plaintiff on the 24th day of November, 1890, and to grant a new trial of the action on the following grounds:

1. Irregularities in the proceedings of the court and an abuse of discretion in the court by which defendants were prevented from having a fair trial.

2. Insufficiency of the evidence to justify the findings and decision.

3. Newly discovered evidence material to defendants and which could not with reasonable diligence have been discovered and produced at the trial.

37 4. That the findings are against law.

5. Errors in law occurring at the trial and excepted to by defendants.

Said motion will be made on affidavits hereafter to be filed and served on you and upon a statement of the case hereafter to be prepared and served on you.

BENNETT, MARSHALL & BRADLEY,
Attorneys for Defendants.

Endorsed: 8757. 3rd dist. court. Victoria Copper M'g Co. *vs.* Wm. Haws *et al.* Notice of intention to move for new trial. Service of copy of within admitted Dec. 3, 1890. Copy mailed. Filed Dec. 3, 1890. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy.

38 UTAH TERRITORY, } ss:
Salt Lake County, }

In the District Court of the Third Judicial District.

VICTORIA COPPER MINING COMPANY, Plaintiff,
vs.
WILLIAM HAWS *et al.*, Defendants.

UTAH TERRITORY, } ss:
Salt Lake County, }

Charles W. Bocker, being first duly sworn, on his oath states that he is a citizen of the United States, forty years of age, and resides in the State of Wyoming; that he knows Lewis R. Dyer; that on the 26th day of November, 1890, he overheard a conversation between said Lewis R. Dyer and Thomas F. Thomas, who is a night watchman in the city of Salt Lake, Territory of Utah. In that conversation he heard said Thomas ask said Dyer about his (Dyer's) location on Brush creek, in Uintah county, Utah, and Dyer replied that he would tell him about it if he would promise not to say anything; that the fact was that he never set any stakes for the claims now claimed by the Victoria Copper Mining Company. He said, I did not have the time, and didn't think anybody would interfere

with me, and said that William Rankin did not assist him in
39 setting any stakes for said claims nor were any stakes set; that a portion of the foregoing conversation was in reply to questions asked him by the said Thomas and a portion of it was volunteered by said Dyer, and that he heard Dyer say that it didn't matter whether he set any stakes or not; he expected to make a good deal of money out of the fight.

(Signed) CHARLES W. BOCKER.

Subscribed and sworn to before me this 1st day of December, A. D. 1890.

W. P. LYNN,
Notary Public of Salt Lake County, Utah Territory. [SEAL.]

This affidavit was used on the hearing of the motion of the defendant for a new trial of the above and foregoing entitled action.

T. J. ANDERSON, *Judge.*

Endorsed: Title of court and cause. Filed January 20th, 1891. Henry G. McMillan, clerk.

40 UTAH TERRITORY, }
Salt Lake County, }

In the District Court of the Third Judicial District.

VICTORIA COPPER MINING COMPANY, Plaintiff, }
vs.
WILLIAM HAWS *et al.*, Defendants. }

UTAH TERRITORY, }
Salt Lake County, } *ss:*

Thomas F. Thomas, being first duly sworn, on his oath states that he is a citizen of the United States, sixty-two years of age, residing in Salt Lake City, Utah, and that by occupation he is a night watchman in said city; that he knows Lewis R. Dyer, and said Dyer was in the habit of walking with him late at night on his rounds; that on Nov. 26, 1890, at the request of Charles W. Bocker, he asked said Dyer the facts as to the locations claimed by the Victoria Copper Mining Company in the above-entitled case, situated near Brush creek, in Uintah county, Territory of Utah, and that said Dyer told him that he would tell him the trusth about the matter if he would promise to say nothing about it; that Dyer said that the truth was that he did not set any stakes in locating said claims; that he didn't have time, and didn't think anybody would interfere with him, and that William Rankin did not assist him to set any stakes; that it didn't matter whether he set any stakes or
41 not, he expected to make a good deal of money out of the fight.

(Signed) THOMAS F. THOMAS.

Subscribed and sworn to before me this 1st day of December, A. D. 1890.

W. P. LYNN,
[SEAL.] *Notary Public of Salt Lake County, Utah Ty.*

This affidavit was used on the hearing of the motion of the defendant- for a new trial in the above and foregoing entitled action.

T. J. ANDERSON, *Judge.*

Endorsed: Title court and cause. Filed January 20th, 1891. Henry G. McMillan, clerk.

42 UTAH TERRITORY, } *ss:*
County of Summit, }

Henry Cunnington, being first duly sworn, on his oath states that he is a citizen of the United States, over the age of — years, residing in Summit county, Utah Territory, and he is a miner by profession; that he knows Lewis R. Dyer, and that on or about Dec. 1st, 1890, in Salt Lake City, Utah, he had a conversation with said Dyer relative to the decision of the district court of the third judicial district of Utah Territory in the case of the Victoria Copper Mining Company *vs.* William Haws *et al.*, in which said Dyer boasted of having deceived the court, and said that although the Antietam and Copper the Ace claims were not in fact staked, that he, Dyer, was no fool, and that he had gotten the ground anyhow, and made the court believe that they had been staked; that affiant has no interest whatsoever in this controversy.

(Signed) HENRY CUNNINGTON.

Subscribed and sworn to before me this 15th day of Dec., A. D. 1890.

JOHN L. STREET,
Notary Public of Summit County, Utah. [SEAL.]

My commission expires June 22nd, 1891.

This affidavit was used on the hearing of defendants' motion for a new trial of the above and foregoing entitled action.

T. J. ANDERSON, *Judge.*

Endorsed: Title court and cause. Filed Jan'y 20th, 1891. Henry G. McMillan, clerk.

43 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

In the District Court of the Third Judicial District.

VICTORIA COPPER MINING COMPANY, Plaintiff, }
vs.
WILLIAM HAWS *et al.*, Defendants. }

STATE OF COLORADO, } ss:
County of Arapahoe, }

E. W. Keith, being first duly sworn, on his oath says that he is one of the defendants in the above-entitled action; that said action was brought on the 6th day of September, 1890, and tried on the 11th day of November, 1890, and from day to day thereafter until the 17th day of November, 1890; that as soon as said suit was instituted said defendants used every effort to discover witnesses who knew of facts material to the defense and who had heard Lewis R. Dyer make any statements as to the staking *of* failure to stake the mining and premises described in *in* plaintiff's complaint; that between said dayes the said defendants spent several hundred dollars in traveling expenses in seeking to discover said witnesses; that none of said defendants at any time prior to the trial of said action knew or had any information or belief that John Connors was a material witness for the defendants, or that he could testify
44 to the matters stated in his affidavit, a copy of which is hereto attached and sworn to on the 8th day of December, 1890.

That said Connors, so far as any of the defendants knew or could learn, had never worked for the plaintiff or for said Dyer, and defendants did not know until after said trial that said Connors had ever been thrown in contact with said Dyer.

(Signed) E. W. KEITH.

Subscribed and sworn to before me this 12th day of January, A. D. 1891.

[SEAL.] GEO. P. BROWN,
Dist. Clerk of Lake County,
By F. BROWN, *Dep't.*

This affidavit was used on the hearing of the defendants' motion for a new trial in the above and foregoing entitled action.

(S'g'd) T. J. ANDERSON, *Judge.*

Endorsed: Title of court and cause. Filed January 20th, 1891. Henry G. McMillan, clerk.

45 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

In the District Court of the Third Judicial District.

VICTORIA COPPER MINING COMPANY, Plaintiff, }
vs.
WILLIAM HAWS *et al.*, Defendants. }

STATE OF COLORADO, } ss:
County of Arapahoe, }

Frank Keith, being first duly sworn, on his oath says that he — one of the defendants in the above-entitled action; that said action was brought on the 6th day of September, 1890, and tried on the 11th day of November, 1890, and from day to day thereafter until the 17th day of November, 1890; that as soon as said suit was instituted said defendants used every effort to discover witnesses who knew of facts material to the defence and who had heard Lewis R. Dyer make any statements as to the staking or failure to stake the mining claims and premises described in plaintiff's complaint; that between said dates the said defendants spent several hundred dollars in traveling expenses in seeking to discover said witnesses; that none of said defendants at any time prior to the trial of said action knew or had any information or belief that John Connors was a material witness for the defendants, or that he could testify to
46 the matters stated in his affidavit, a copy of which is hereto attached and sworn to on the 8th day of December, 1890.

That said Connors, so far as any of the defendants knew or could learn, had never worked for the plaintiff or for said Dyer, and defendants did not know until after said trial that said Connors had ever been thrown in contact with said Dyer.

(Signed) F. A. KEITH.

Subscribed and sworn to before me this 12th day of January, A. D. 1891.

[SEAL.] GEO. P. BROWN,
Dist. Clerk of Lake County,
By F. BROWN, *Dep't.*

This affidavit was used on the hearing of the motion of the defendants for a new trial in the above and foregoing entitled action.

(Signed) T. J. ANDERSON, *Judge.*

Endorsed: Title of court and cause. Filed January 20th, 1891. Henry G. McMillan, clerk.

47 TERRITORY OF UTAH, }
County of Salt Lake, } ss:

In the District Court of the Third Judicial District.

VICTORIA COPPER MINING COMPANY, Plaintiff, }
vs. }
WILLIAM HAWS *et al.*, Defendants. }

STATE OF COLORADO, }
County of Arapahoe, } ss:

Michael E. Smith, being first duly sworn, on his oath says that he — one of the defendants in the above-entitled action; that said action was brought on the 6th day of September, 1890, and tried on the 11th day of November, 1890, and from day to day thereafter until the 17th day of November, 1890; that as soon as said suit was instituted said defendants used every effort to discover witnesses who knew facts material to the defense and who had heard Lewis R. Dyer make any statements as to the staking or failure to stake the mining claims and premises described in plaintiff's complaint; that between said dates the said defendants spent several hundred dollars in traveling expenses in seeking to discover said witnesses; that none of said defendants at any time prior to the trial of said action knew or had any information or belief that John Connors was a material witness for the defendants, or that he could
48 testify to the matters stated in his affidavit, a copy of which is hereto attached and sworn to on the 8th day of December, 1890.

That said Connors, so far as any of the defendants knew or could learn, never worked for the plaintiff or for said Dyer, and defendants did not know until after said trial that said Connors had ever been thrown in contact with said Dyer.

(Signed) MICHAEL E. SMITH.

Subscribed and sworn to before me this 9th day of January, A. D. 1891.

[SEAL.] EDWARD S. IRISH,
Notary Public in and for said Arapahoe County and State of Colorado.

My comm. expires 7, 16, '92.

This affidavit was used on the hearing of the motion of the defendants for a new trial in the above and foregoing entitled action.

(Signed) T. J. ANDERSON, *Judge.*

Endorsed: Title of court and cause. Filed January 20th, 1891. Henry G. McMillan, clerk.

49 In the District Court in and for the Third Judicial District, Territory of Utah.

VICTORIA COPPER MINING COMPANY, Plaintiff,
vs.
WILLIAM HAWS *et al.*, Defendants.

TERRITORY OF UTAH,
County of Salt Lake, } *ss:*

John Connors, being first duly sworn, says: I was working at Henry's Fork for Mr. Mahoney in May, 1889. Mahoney was going to work for Dyer sharpening tools, &c., and he wanted me to work for him so that he could do Dyer's work. I worked for Mahoney as requested and went to him for money. He told me that he would pay me as soon as he could see Dyer and have a settlement with him. I saw Dyer on Henry's Fork when he was on his way to Carter's Station. I think that was in May or June, 1889. I don't know the exact date. I asked him for a situation driving a team. Dyer told me that he had no work for me; that there was no money in the mines; that he had thrown them up. I told him I had a notion of staking a claim next to him. He said, "You can stake whatever you want; I have got no stakes drove at all."

I had heard it talked that Rankin, whom I know by sight, had staked a claim there, and I asked Dyer if Rankin had not
50 staked some ground there. He told me no; that if I thought there was anything in it I could go there and stake all the ground I wanted. Dyer told me there was nothing in it; that *it* had worked the ground and it did not pay. This was the last time Dyer was over to the mines, as far as I know. I remained there the balance of the summer, and think I would have known if he had gone back.

(Signed) JOHN CONNORS.

Subscribed and sworn to before me this 8th day of December, 1890.

[SEAL.] N. A. ROBERTSON,
Notary Public, Salt Lake Co., Utah.

This affidavit was used on the hearing of the motion of defendants for a new trial in the above and foregoing entitled action.

(Signed) T. J. ANDERSON, *Judge.*

Endorsed: Title of court and cause. Filed January 20th, 1891. Henry G. McMillan, clerk.

51 In the District Court in and for the Third Judicial District, Territory of Utah.

VICTORIA COPPER MINING COMPANY, Plaintiff,
vs.
WILLIAM HAWS *et al.*, Defendants.

TERRITORY OF UTAH,
County of Salt Lake, } *ss:*

N. A. Robertson, being first duly sworn, on his oath says that he is a citizen of the United States, over the age of twenty-one years, and a resident of Salt Lake City, Utah; that on the 20th day of January, A. D. 1891, he went to the office of C. C. Dey, the attorney of plaintiff in the above-entitled action, at No. 2486 Washington Ave., in Ogden City, Utah, and found his office not open and locked; that thereafter, to wit, at the hour of 5.30 p. m. of said day, he went to the residence of said Dey, at No. 2272 Madian avenue, in said Ogden City, and then and there left with a person of suitable age and discretion, who was in charge of said residence and whose name is unknown to affiant, a copy of defendants' statement on motion for a new trial in said action, together with a copy of the affidavits of John Connors, Henry Cunnington and C. W. Bocker, Thos. F. Thomas, Frank Keith, E. W. Keith, and Michael E. Smith in support of said motion.

(Signed) N. A. ROBERTSON.

52 Subscribed and sworn to before me this 20th day of January, A. D. 1891.

W. M. BRADLEY,
Notary Public, Salt Lake County, Utah.

Endorsed: 8757. 3rd district court, Utah. Victoria Copper Mining Company *vs.* William Haws *et al.* Proof of service of statement on motion for new trial. Filed January 21st, A. D. 1891. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy.

53 TERRITORY OF UTAH,
County of Salt Lake, } *ss:*

In the District Court of the Third Judicial District.

VICTORIA COPPER MINING COMPANY, Plaintiff,
vs.
WILLIAM HAWS, HEBER TIMOTHY, EDWARD W. Keith, Frank A. Keith, Samuel R. Whitall, William V. R. Whitall, and Michael E. Smith, Defendants.
} Statement on Motion for New Trial.

The above-entitled cause came on for trial in said court on the 11th day of November, A. D. 1890, and was tried before the Honorable Thomas J. Anderson, judge, without a jury.

Plaintiff appeared by Messrs. C. C. Dey and E. D. R. Thompson,

and the defendants by Messrs. Bennett, Marshall and Bradley, and thereupon the following proceedings were had:

To support the issues on its part the plaintiff called—

LEWIS R. DYER as a witness, who was sworn in its behalf, and testified—

That he was a native-born citizen of the United States, residing in Chicago, Illinois; that he first went into the Carbonate mining district, in Uintah county, Utah Territory, in June, 1881; that he returned there in 1887; I went there to locate mining claims,
54 and prospected along the mountain side in July and August; that on or about the 19th day of August, 1887, he placed stakes at corners one and four of plaintiff's claims, in connection with a tunnel location, and also made a mill-site location near by. At that time there was no indication of any one having been on the ground afterwards claimed by the plaintiff for a long while. Since I was on the ground in 1881 some work had been done. There was a shaft there designated as the Heater shaft also another shaft near by about sixty feet deep, and there was several pick-holes along on the hill. On the 17th September, 1887, I finally decided to make two locations, which were cal-ed by me the Copper the Ace and the Antietam. I wrote two notices on a tree and staked out the claims; the notices were written the 17th day of September, 1887; the tree was approximately midway between the Heater shaft and an open cut where same began a tunnel, marked on the map hereto attached "X" and "B" respectively, and was the largest and most convenient tree around there; it was rather nearer the open cut than the Heater shaft; it was upwards of 60 feet high, and at the height of my shoulder was about 16 inches in diameter, and was a dead white-pine tree; had no bark on it. There was a big branch that pointed towards the north. The tree was as large a tree as there was there; there were larger trees up there, but they were all red pines, and very much decayed, and this was a white-pine tree. The notices were written on the tree with a lead pencil; the two notices recorded are copies of these written on the tree. I also staked the claims out. At the two corners which are
54½ common to the Copper the Ace and the Antietam I already had stakes, having placed them there to define the tunnel location at the time of that location. After writing the notices on the tree I put in other stakes, commencing with the Copper the Ace. I put in stakes at the points marked P 2 and P 3 of the Copper the Ace and of the Antietam, as shown on the map hereto attached. I also put a stake at the center of each side line of those claims. On the two stakes common to the Copper the Ace and the Antietam, which had been theretofore put in, I put "A" on the side of the Antietam and the letters "C A" on the side of the Copper the Ace, in lead pencil. In order to set the stakes at the end I measured through the center line, and I put markers at 1,500 feet; and then, in order to put the corner stakes, I measured an offset of 300 feet on each side and left the stakes at the center of the end lines. Those stakes at the center of the end lines were just put in for markers, for

me to find again. They were three and a half or four feet high, so that I could notice them. All the stakes but the one placed at the point marked P 1 were of dead timber. The one at P 1 was a tree they had cut down in cutting the road. All of the stakes except the one at the point marked P 4 on the map were supported by stones piled around them. The one at P 4 came in the dead timber and did not need any support. The stakes were set within two weeks after the loc-tion notices were written.

I am the vice-president and general manager of the plaintiff corporation, and have been such since its organization. The
55 Antietam claim as located ran northwest from the discovery tree, and near the center line of the claim there was a ledge of rocks which was visible for some distance, and beyond the end line of the Antietam there is a little peak on that ledge. The peak was beyond the end of the claim. The Copper the Ace claim as located ran southeast from the discovery tree, and perhaps 350 feet southeast of the end of the outcrop of rocks before mentioned was the southeast end line of the claim. It was practically a continuation of the lines of the Antietam. I have not been on the ground since the latter part of April, 1889. At the time of making these locations I had been engaged in mining off and on for a dozen years. I went to Leadville in the winter of 1878–'79, and was there in 1880. I did there the first mining work I ever did. I was in charge of a mine. In 1881 I came into the country where the plaintiff's claims are located. At that time a man by the name of Sam. Montgomery claimed the property, and he had a hole there. I left the claim on the 28th or 29th of April, 1889, and laid at the railroad station until the 4th day of July, and then came to Salt Lake City, and remained there about a month. I then returned to Chicago; remained there until the middle of October, 1889. I then went to New York, and from there to Boston; returned to New York for a few days, went on a vessel, and went down to the West Indies, and remained there until the middle of February, 1890, and then I got on an English mahogany and log-wood steamer and came back to Norfolk, Virginia; went to various places, and finally returned to Chicago in April, 1890, and have been there most of the time since.

56 When I went into this country in 1887 William B. Rankin and Edward Sanftleban were with me. Neither of them were miners. I made no locations in the country besides these two mining claims. Rankin was present when I staked off the claims the most of the time and helped me to make the measurements through the center line. I discharged Sanftleban, and Rankin and I were there alone until joined by Lawson. At the time I wrote the notices of location on the tree Shaw, Lawson, and Sudwick were in the camp, but they were working on the road to the north, over towards Brush creek. I had made the measurements previously with Rankin, and when he was not there I would measure myself. I had measured the center line of these locations prior to the 17th, but had placed no stakes except the stakes marked on the map P 4 and P 1. All of the stakes but these two I put in myself. The three men mentioned were in camp. Rankin was also there; a part

of the time was away to Carter's Station. Rankin left Monday, the 19th of September, and was gone ten or twelve days, but he helped me to put in the first two stakes, P 1 and P 4. P 4 was the only stake that was not surrounded by stones. It was supported by dead timber. Rankin helped me to make the measurement, but I believe he was not there when I put in P 4. He ordinarily worked on these mining claims and at anything I told him to do. The post at the point P 1 was of live timber. It was a piece of an evergreen tree that I cut down; I think a piece of spruce. I drove it into the ground and piled stones around it. It was close to a fir tree and leaning against the branches of this tree. The post was four
57 feet high and four or five inches in diameter at the large end. I wrote nothing on it at the time I put it in for a tunnel site. When I made it a common stake of the Antietam and the Copper the Ace I put "C A" on the southerly side and "A" on the northerly side or the northwesterly side with one of those blue analine pencils, which was supposed to be indelible but which are not. It was one of those analine pencils which are no good. At the points marked P 2 and P 3, Copper the Ace, the posts were of dead timber. I am not positive whether they were pine, spruce, or fir. They were three and a half to four feet in height—I think four feet—and four or five inches in diameter at the large end. It was pretty clear where these stakes were driven. No timber around them tended to obscure them. I piled stones around them a foot or a foot and a half in height so as to secure them good. The timber was dry timber; not sound. I think I put "C A" on these posts with the same pencil. I chafed off the side of the post where I did the lettering. I chafed it off with a hatchet. I put the same kind of stakes on at the center point of the side lines of the Copper the Ace. They were all planted firmly in the ground as well as I could drive them with the hatchet, and were then supported by stones; the stones piled a foot or a foot and a half high. They were stakes of the same general description as those before described; such stakes that I could readily find again and any one else could if they wanted to. The stake set at the center of the southeasterly end line of the Copper the Ace was the same kind of stake. I put it there simply for future reference, with stones piled around it, although I was not particular about the stones, as it was only a temporary point for me to find again when I
58 wanted to make the set-off measurements. At post 3 of the Antietam I put in the same kind of stake of dead timber just as high as the others; put stones around it; the stones were piled around it sufficient to support it. The post at the point marked cor. 1 on the map was a common post for the two claims. It was a prominent place, where it could be easily seen. I do not know whether the post was there when I left in 1889 or not. I do not know whether the post marked cor. 4 was there. I don't know whether the end posts of the Copper the Ace, marked cor. 2 and 3, were there when I left in 1889. I do not know whether the northwesterly end posts of the Antietam were there when I left in April, 1889. I don't remember when I had last seen them prior to leav-

ing. I put all the posts in myself except those common to the two claims. Rankin helped me to put in one of those and to make the measurements for the other. It may have been ten days or two weeks before all the posts were put in and after the location notices were written on the tree. I selected the tree because it was about midway between the Heater shaft and the open cut; there were three old shafts in that immediate vicinity. The Heater shaft was quite deep, and then another not quite as deep as the Heater. The Heater shaft was about sixty feet deep, and then there was another shaft about seven feet deep, and then there was another shaft about fifty feet deep. The tree was nearer the fifty-feet shaft, which was the southeasterly one of the three shafts. These three
59 shafts and the open cut near by were all of the works in that immediate vicinity at the time of my going there. All of the posts put in by me were chafed off with a hatchet at the top where I did the letiering and sharpened at the point. The tree, in my judgment, was about 15 or 25 feet from the southeasterly shaft of the three old shafts there. Without referring to the map I could not give the bearing of the tree from the shaft nor can I come closer to the distance than as stated before.

J. N. Barr worked for me at one time. I don't remember his asking me to show him the boundaries of the Copper the Ace. I did not say to him that I would get a surveyor up to determine them. I didn't make that statement to him. I don't recollect that he asked me to show him the boundaries. Barr quit work on the 29th October, 1888. At the time Barr quit I didn't say to him that I had no stakes on the claim and didn't own any land there. William Henry was working for me on the 10th October, 1888, driving drills. I don't remember that I asked him to go up the hill with me so I might show him where I desired the cabin built. I don't remember on the occasion stated showing Henry any notice on a dead pine tree on the right of the trail going up and much lower down the hill than the tree I have named as the location tree, and telling him that a notice posted there was a notice of the Copper the Ace claim; in fact, I am certain I did not. I know of no notice being posted there.

Charles Bocker was working for me in July and August,
60 1888, first on the road and afterwards on the claims in question. I discharged him on the last of October, 1888. In July or August, at the mining claims, Bocker did not ask me where my ground was, nor did I reply to him that I would tell him when I got ready. Barr was not present at such conversation; no such conversation took place. Bocker made a location there. I didn't tell him that he was on my ground, and Bocker did not reply to me, Show me your stakes and I will move; and I did not refuse to to show him the stakes, because I had no such conversation with him. I don't know when he made his location. Bocker's location was made prior to the middle of July, 1888, I think, but I didn't have the conversation referred to with Bocker in July or Augugt, 1888.

I know William Thomas. He worked for me on the claims in

question. I don't remember that he asked me at Vernal in the summer of *of* 1888 where my stakes were, nor do I remember that I refused to reply to him. No such conversation took place.

I know Lewis V. Shurtliff. I may have had a conversation with him about July 1st, 1889, at Carter Station, in Wyoming, about the Haws relocation, but at such conversation I did not tell him about this relocation and say that if Haws had the claim staked off I could not do anything, because I had never staked it. About the same time I had a conversation with Henry at Carter Station. I may have had a conversation with him about that time about Haws jumping the claim, but I didn't tell him that I thought Donoher was in with him. I may have said to him that as
61 soon as Ferguson came out I would go back and take the property, but I did not tell him that it did not matter if I had any stake or not; that I had my notices recorded. At the conversation referred to with Lewis V. Shurtliff, Shurtliff may have asked me about getting his pay from the company, and I told him to make out his bill and send it to the company. I didn't tell him, however, that he must get the amount due him out of the property left at Fort Bridger, or that I had given up everything and supposed the company had done the same. In January, 1888, I was at the mine a portion of the time and a portion of the time I was at Ashley and Vernal. I was not at the mine during February, 1888. It appears the notices of location were recorded on the 13th day of February, 1888. I didn't send them to any one to have them recorded, but gave them to Blythe & Mitchell. I gave them personally. I don't recollect the date. When I was down in Ashley in January I went up one day to see the recorder. He was not there and I left the notices with Blythe & Mitchell. I don't think I sent them to Mitchell in a letter. The notices recorded were written in the cabin at the camp. They were not written at some hotel and I don't think I enclosed them in a letter to Mitchell. I don't remember copying them over again. They were not enclosed in a letter to Mitchell, because I should be pretty certain to remember if it were so.

The two copies of location notices, marked Exhibits D and C, were written shortly after the location—within a month after
62 the location—very likely two or three days. I went to Vernal in December, 1887; was down there again in January, 1888. When I went in December I did not have the notices with me; I left them in my cabin. When I went down in January I did have them with me. I have a memorandum of the location notices that I kept for my own use, and also some memoranda jotted down on envelopes, but all these memorada are at the mine, and I have not them with me. I would like to correct the testimony that I heretofore gave as to Exhibits C and D, as to when they were written. The copies I made in camp were on a figuring block. When I came to Salt Lake City I stopped at the White house, and there I copied them on paper about the 1st of February, 1888, in Salt Lake City, and mailed them to Blythe and Mitchell at Vernal, with a request that they should be recorded. In September, 1888, J. N. Barr

did not ask me to point out the boundaries of the Copper the Acre claim, and I did not reply that I would get a surveyor up to determine them, nor did I state anything in substance like that. There was something said about forming a district there and getting Arthur Johnson as surveyor. I don't remember having any conversation with Barr about the boundaries of the claim. I recommended Arthur Johnson as a surveyor if they were a-going to establish a district. About the 27th or 28th of September, 1888, at the claim referred to in respect to the location that Bocker had theretofore made, I did not state to him that he was on my ground, nor did
63 he reply that if I would show him my stakes that he would move his, which I declined to do. I am positive no such conversation occurred. At Oak Park, on or about August 1st, 1888, in the presence of Henry and Frank Warner, I do not remember that McLaughlin stated to me that when he returned to the mines he wished to go prospecting and wanted to know where my stakes were, and I replied that it didn't matter; that if he got on my ground I would let him know. I think I can state that no such conversation occurred.

The last time I heard of Rankin he was in California. I don't know where he now is.

The tree on which the location notices were written was blazed. I think Rankin blazed it—shaved it off with a hatchet. It was blazed before the notices were written and probably a couple of feet above the ground.

I have heard that Lawson was in Colorado. I destroyed the original notices written on the figuring block after I made the copies in the White house, in Salt Lake City. The dead timber used by me for stakes was in sound condition.

WILLIAM SHAW, being sworn as a witness in behalf of plaintiff, testified as follows:

I am a miner and prospector and have been such since the latter part of June, 1879. I reside at Silver Plume, Colorado. I work for Lewis R. Dyer in Uintah county as a miner; commenced working for him on the morning of the 6th September, 1887, and continued working until the latter part of November or the first
64 of December of the same year. The place where I worked was about twenty miles northwest of Vernal, in the Ashley valley. I first helped to build cabins, gathered a lot of float ore, worked on the road, and on the third of October commenced working on the property in dispute. There were old workings there, done by former prospectors.

The only name the old works were called by that I know of was the Heater shaft. I know of some location notices of Mr. Dyer. They were a little above the open cut marked on the map B and a little higher up the hill. The notices were on the remains of a dead tree with the top of the tree broken off. It had been standing so long dead that the bark had fallen off. I don't remember distinctly what notices I saw on the tree except that I did see them. I read them over—just glanced at them—and saw the signature.

Mr. Dyer's name was signed to them, and the name of the claims was written across the top in the usual prospector's way of writing notices. They were signed, I think, Lewis R. Dyer. There were two notices on the tree. The tree was about eighteen or twenty inches in diameter, and the notices were written with a lead pencil. I didn't see them written, but saw them several days after I commenced work on the claim, after October 3, 1887. I didn't have any occasion to look for the boundaries of the claim. I saw one stake that was over the ridge to the south. I never saw any other stakes that I am certain about. I think I saw one down where the trail left the road, but I am not certain as to that at all. My
65 work was around the open cut and I had no occasion to go out in either direction from it.

I know William Haws. I have seen him at Ashley. I had a conversation with him in June or July, 1889. It was in Vernal, I think; in front of the co-op. store; I am not certain about the exact location. It was the latter part of June or first of July—before the fourth of July, 1889. We talked about his having jumped the claims. He told me the company owed him money and he could not get a settlement out of them and he had to jump the property to protect himself, and went on to say further that he understood there was a law by which if a man did not keep up his stakes, keep the boundaries up so that anybody could find them that it laid the property open for relocation, and I laughed at him. There was no one present at the conversation. It was on the edge of the road, and between the 25th of June and 4th of July, 1889. I could not say what time of day it was; it did not make enough impression on me.

The stake that I saw south of the works was about four or five feet in length and three or four inches in diameter; I think it was of pine; I would not be sure about it; it was a little bit blazed and marked on two sides. I cannot state what the marks were. I judge it was about three hundred feet distant from the shaft called the Heater shaft and marked on the map Z. I did not measure the distance and would not be sure. The tree on which the Dyer notices were written was a dead tree, the top of which was broken off, but I didn't notice the top lying on the ground. When
66 I saw it the stump was about 16 or 20 feet in height—simply a snag standing up. I think there was a short limb on it. The tree was standing east of the Heater shaft, marked Z on the map. There were three old shafts there.

I know Richard Pope. I met him in Ashley valley while I was working for Lewis R. Dyer. I don't remember that he asked me where Dyer's notices had been posted, nor do I remember replying to him that I never knew. I remember meeting with him about the 10th of September, 1888, at Young's Springs. On that occasion I don't think he asked me where Dyer's notices had been posted, nor did I reply that I did not know. I would be almost willing to swear that he didn't ask the question nor I make such reply.

I know W. V. R. Whitall. I had a conversation with him and William Henry at the Walker cafe, in this city, on November 10 last, at 8.30 o'clock in the evening. At such conversation I told him

that I didn't see Dyer stake the ground, but I didn't tell him I didn't see any of his stakes. I have a distinct recollection of the conversation.

I have received from the company simply my wages and expenses. In addition to that I have a little claim against the company for about twenty dollars, which they have promised to settle. While I was there in September and October, 1887, Dyer would come around in the morning and see how we were getting along, and then would start over the hill, and I could not tell where he went. The chances are that we would not see him again until supper. He was up on the claims as if he was looking over them. The rea-
67 son I remember that the top of the tree was gone, the tree on which the location notices were written, is that it was the only tree of that kind standing around there. I do not know that anything recalls to me the tree with the top broken off, only that is the way I remember the tree. I have not been to that particular point on the claim since I quit work. There was a little blaze on the tree, but the notices were not written on the blaze.

Plaintiff here offered in evidence recorded copies of the notices of location, hereto attached and marked Exhibits C and D respectively. These notices were offered in connection with the amended notices set forth in the findings. Defendants objected to the introduction of said copies on the ground that it did not appear that they were filed in any mining recorder's office, and that there was no law requiring them to be filed in the county recorder's office, and that his certificate thereto was therefore no evidence of the contents of the original, and also because it appeared that the paper filed in the county recorder's office was itself a copy of a copy. The same objection was made as to each of said exhibits.

The COURT: I will receive it subject to the objection.

To which ruling of the court the defendants then and there duly excepted.

Plaintiff also offered, for the purpose of proving a valid location of the Antietam lode and Copper the Ace Lode mining claim, and there were received in evidence, copies of the location notices of the Ontario and Scottish Chief mining claims, recorded in the
68 office of the mining recorder on the 11th day of June, 1889, the latter signed by Heber Timothy and William Haws, two of the defendants herein, and the former by said William Haws, in which notices it was recited that the respectively were relocations of the Antietam lode and Copper the Ace lode.

WILLIAM C. MCLAUGHLIN, a witness in behalf of plaintiff, testified as follows:

I reside at Ogden and have so resided since August 3d, 1888. I could not say as to my business. I have different trades, as far as that goes, but in general it is mining and prospecting. I was in the employ of the Victoria Copper Mining Company in June and July, 1888, and know the ground claimed by the company. I walked

over the ground from one end to the other, and have seen stakes. I saw one at the extreme north end of the two claims, near the summit. I mean by that the highest peak of rocks. There was a stake there within two or three hundred feet of that point of rocks. It was a pine stake, from appearances a limb off a tree, a pine tree, or off the top of a sapling, cut off and stood on the ground. I also saw a stake where we loaded ore at the mine. Where we loaded was about the place marked cor. 4 of the common corner between the Antietam and the Copper the Ace. I also saw one between there and the cabin to the right of the road as we went to the cabins. It probably was about three or four rods off from the road. I don't know whose stake it was. There was also a stake to the north-
69 east, where the road came down the hill; there was one stood up in the timber back from the road about three or four hundred feet. There was one directly above the workings of the mine also; it stood in a sag between two ridges. I saw several stakes along the west side of the southwest slope. I know a claim said to have been located by William Haws and Donoher. The claim was the Harrison claim.

Q. Did he, Haws, show you that claim?

Defendants object to the question as hearsay and immaterial, it appearing that at this time, namely, in June or July, 1888, Haws was not interested in the property to the title to which defendants succeeded, and that at the present time he is not interested at all in the property, although nominally a defendant to the suit.

The COURT: Oh, well, he may answer subject to the objection.

To which ruling of the court the defendant then and there duly excepted.

A. That is the Harrison—well, we walked to the stake and he said it was his corner stake.

The defendant asked to strike out the answer of the witness, and the motion was overruled by the court. To which defendants duly excepted.

(Witness continuing:) He stated that it was the corner stake of the Copper the Ace claim.

Defendants moved to strike out this on the same ground. Same ruling by the court. Exception by defendants.

(Witness continuing:) That stake stood at the foot of the
70 hill, as near as I can recollect. It was nearly a quarter of a mile from where we were working. There is also a marked tree that stood about fifteen feet above the road—close to the road. Defendant Haws didn't show me the claim that he had located. He went as far as the stake and turned back. We didn't walk over it or stop there. He explained to me the direction in which it lay, and told me about it. I was talking of locating there myself, somewhere in that district, and he wished that I would go in on his claims for an interest in them. He said his claim connected with

the end of the Copper the Ace, but lay just in the other direction. I recognize the location shown me on the map. I saw a stake at the point marked cor. 2. I cannot say whether I saw one at cor. 3 of Antietam or not. There were several stakes in that part of the mountain. I saw one near the center of the end line of the Antietam. There was a stake where we loaded ore. That would be at the place marked cor. 1, common corner of the Antietam and Copper the Ace. It was a good stake. It would not fall readily, because I ran over it with a wagon—that very one. The stake I spoke of a while ago in the basin over the rise would be at P 2 of the Copper the Ace. My present business is laying stone—stonemason; brickmason, journeyman, at Ogden. I entered the employ of the plaintiff in June and quit in July, 1888. I have not been back there since.

When I was there, there was but one road leading from the mine. The stake I saw that I ran over with a wagon was to the left of the road that came down the hill. We cut around the
71 stake sharp. The wagon road was right by the stake, and it was a good stake. In coming down the road from Carter Station we would go to the right of the stake. I could not tell what class of timber it was. It must have been grown on the ground where it was put in. Cattle could walk over it. We had 12 or 15 head of oxen on top of it and did not knock it down. It was about two feet high above the ground. There were rocks piled around it and all around the hillside at that point. I drove oxen that could walk over a stake four feet high. The oxen didn't knock the stake down when they walked over it. They walked straddle of the stake. The stake was about four inches in diameter. I didn't observe whether it had any writing on it or not. I didn't notice the kind of wood it was. The stake I saw near the peak of rocks was from 18 inches to 2 feet high. It was a short stake and about two inches thick at the big end. There were knots on the stake. At the point marked cor. 2 of the Antietam there was a stake somewhat similar to the one where we loaded the ore. It appeared to me about two feet above the ground, with a few rocks around the stake. I didn't notice anything on it. I saw stakes at the point marked cor. 3 of the Antietam, but whether it was a stake belonging to that claim or not I could not say.

Q. About how many stakes did you find there, at the point marked P 3 or in that vicinity?

A. Well, now, I come around this mountain and there was stakes all around there and diggings.

(Witness continuing:) There had been old stakes there,
72 and there were stakes along the slope of the mountain. Between the point called peak and cor. 4 of the Antietam I found about three stakes. Then there was stakes going west there, I don't know how far. There were loose stakes made out of lumber. This was in 1888. I started to go to the claims in June, 1888, but I got there in July—I believe about the 12th of July—and I quit work on the 28th of July. I was at this time six or eight days, I think, at the mine. All of the stakes

that I saw between the peak mentioned and post No. 4 of the Antietam were of the same general description as those I have described. At cor. 1 of the Antietam the stake was, I should judge, about two feet high, was a smaller stake than the others, and at cor. 4 of the Antietam the stake was also small. It must have been as large as two inches in diameter. The marked tree I referred — stood about half way up the road from the mine.

There had been some old works down there. The tree was towards the northwest end of the claim. All the stakes I saw appeared to be old to me, and I noticed some of the stakes around the old diggin-s and off of the ground now claimed by the company.

Q Were you shown any stakes by Mr. Dyer?

This question defendants objected to as a self-serving declaration on the part of an officer of the plaintiff, and defendants' counsel stated he objected to said question as calling for hearsay and as being a self-serving declaration on the part of an officer of the company;

73 that what he objected to was not that the witness saw stakes, but that Dyer had shown them. Objection overruled by the court; to which ruling the defendants then and there duly excepted.

A. He showed me one stake, and that was located where we loaded ore, and is about the place marked cor. 1, common stake of the Antietam and the Copper the Ace. That is the only stake he showed me. At the time I was not working at the mine. I was hauling for the company.

WILLIAM DONOHER, sworn in behalf of plaintiff, testified as follows:

I went to work for Mr. Dyer or the Victoria Copper Mining Company, on the claims in question, on the 17th day of November, 1887, and continued there steadily until November, 1889. I was foreman, and when Mr. Dyer left the claims, about the 1st of January, 1889, he left me in charge. William Haws, one of the defendants here, commenced to work for Lewis R. Dyer on the 10th of December, 1889. I worked first on the road; probably there about ten days; then I worked on the claim. In May, 1889, we started the new tunnel (called on defendants' map lower Dyer tunnel). The object of this tunnel was to raise in and take ore out of the winzes we had sunk in the long or main Dyer tunnel, which latter tunnel was situated wholly within the side lines of plaintiff's claims.

At the time Haws jumped the claims I was working with two men in tunnel marked lower Dyer tunnel on the map hereto attached. The names of the men were Andrew Johnson and

74 George Sheltonn. I think Haws jumped the claims on the 10th of June, 1889; that was Sunday. Haws went up there some time Sunday night, and when we went up Monday morning to go to work he refused to let us go to work. We had worked there on the Saturday preceding and had left there Saturday evening at 6 o'clock and had left our tools there. I and the men lived about a mile below, at the cabins belonging to the plaintiff. We

spent Sunday at the lower camp, what was called Parson's sawmill, and didn't work at all until Monday morning. When we went back where, at the same place, namely, at the lower Dyer tunnel, where we had been working on the Saturday previous; we found Mr. Haws there and one of the Timothys with him; I don't remember his name; it is not the defendant Timothy; and another man was there, a stranger to me. We went up about seven o'clock and found them in possession of the lower tunnel. I asked Haws if he refused to let us go to work, and he said, Yes; and he advised me to go and telegraph to the company. Nothing else was said. I told him to take care of the tools while I was gone. Haws had been in the employ of the Victoria Copper Mining Company. I think he commenced work for the company on the 10th of February, 1888, and worked from that time on—not constantly, but almost every month—until January 1st, 1889. He worked some in March, 1889, in April, 1889, and May, 1889, and also one day in June, 1889. The day in June was the first of June. He then quit work.

75 Haws staked the claims off prior to jumping the mine—that is, before he took possession. I knew that he was going to jump the mine prior to the time he went up there Monday morning, June 10th. He had told me that he would probably a month before he did. He spoke to me about it several times, and said he had written Copp about it. On the Sunday, June 9th, he told me I had better quit work on the claim for several days; that was before he took possession of it. I told him I would not do it, or I would not quit work until I had to. He said, You will stand in with Dyer? I said, No; I stand in for myself. And he said, Well, I guess you will have to quit. I think William Thomas was present at the time. This conversation occurred at Parson's old sawmill, about a mile and a half from the claims. At the time Haws took possession of the mine work had been done above the lower Dyer tunnel, on the claims. I know A. Jessen, the surveyor. He was on the mining claims in question about the latter part of September, 1890, and was there before that time also. I was present when he made the survey; I showed him the initial point from which he started.

Q. Did he, Haws, ever locate any mining claims in that vicinity?

Defendants objected to this as immaterial, as far as the defendants were concerned. The counsel for the plaintiff then stated that he wished to show that Haws had, prior to his relocation of the plaintiff's claims, located claims adjoining those claims, and in that way recognized their existence. The court overruled the defendants' objection; to which ruling of the court the defendants then and there duly excepted.

76 A. Yes, sir; he located one claim, called the Harrison. It joins on the east end of the Copper the Ace. At the time of locating that claim we measured from what we supposed was the discovery point of the Copper the Ace 1,500 feet. The point we measured from was the open cut on the Copper the Ace and marked

on the map hereto attached B. Haws and myself did the measuring and measured in an easterly direction. After we measured 1,500 feet I saw a stake there. Haws was present. The Harrison lay at right angles with the Copper the Ace. I don't remember when we did the measuring, but we had the claim located on the 22d of April, 1889. The measuring may have been done a week before. I believe years before that Haws and I had a notice upon the ground, but we did not have it recorded. I don't think it was under the same name. I don't remember what we called it. I saw the stake right close to a point 1,500 feet from the open cut. I think it was a quaking-asp stake, with the root turned up. The small end was stuck down. It may have been five or six feet above the ground; I don't remember. Stones were piled around it. It was not cut any way with a hatchet. It was not squared off at the top. The root was on it; it was about five inches through; there was a blaze on it. I didn't see anything on the blaze. It was right on the ridge. I don't remember that I called Haws' attention to it, but I may have. After measuring 1,500 feet from the open cut I think we allowed 150 feet to get off the ground after that. I don't think we measured the ground allowed. The claim does not
77 exactly adjoin the Copper the Ace; there is a fraction between them. I don't think there was as much as a hundred or a hundred and fifty feet between them. The wedge between is nearly eight or ten feet in some places. I don't think that wedge has been subsequently located. It is in wedge fashion and runs up very narrow at the north end. The Harrison claim is not perpendicular to the Copper the Ace, but leaves an unoccupied wedge between. The cabins where we lived were about a mile and a half off the claim. I don't think Haws was on the claims Sunday; I didn't see him there at all. We were not on the claim from Saturday evening until Monday morning. I first saw the stake on the ridge some time in April, 1889. The year before, I think, we made a location covering the ground of the Harrison—that is, I think we put up a notice, but I don't think we set any stakes or had it recorded; I know we did not have it recorded. I don't think we did the measuring the year before.

I know J. N. Barr. He was working for the plaintiff company at the time I was. I don't remember that in the fall of 1888, while working for the company, he asked me where the boundaries of the Copper the Ace were, nor do I remember stating to him that I had never seen any stakes marking them.

I know Charles Boker. I believe he made a location in July or August, 1888. I don't remember that he asked me where Dyer's stakes were prior to making that location, nor do I remember that I replied to *to* him that I didn't know.

78 I know Richard Pope. He was working for the plaintiff in the fall of 1888. I don't remember that he asked me where Dyer's stakes or notices were, nor do I remember to have told him I didn't know. In the summer of 1889, after the Haws relocation, in the presence of Richard Pope, I don't remember that Heber Timothy asked me where Dyer's locations were, nor do I remember to

have replied to him, Haven't you seen the record? or that Timothy then stated, Yes; but where is the tree? or that I replied to him that I don't know. I don't remember having any conversation with Mr. Timothy at all, nor do I know that such conversation was in the presence of Richard Pope. About the 27th of August, 1890, at the mine in question, I remember having a conversation with Frank Keith about these stakes, and told him that I could not swear to any. I believe I told him I had seen the stakes, but I could not swear to them. I didn't tell him that I had never seen any stakes that I knew to be Dyer's, and had never seen any notices, nor that in substance. I believe I said to him on that occasion that I had information from some officer of the plaintiff company which would show that the Victoria Copper Mining Company had no claim on the ground; that the company owed me six hundred dollars, which I wanted to get and also that if I had got the money I would give him information, but didn't wish to endanger my money. I believe I also stated to him that I had letters from the officers of the plaintiff company, Dyer and others, which would be useful to the defendants in this action. I don't think I told him that if I
79 got my money I would give him the letters. I don't remember having any conversation with Frank Keith in the presence of W. V. R. Whithall in Salt Lake City about October, 25, 1890, in front of the Cullen hotel, nor that Keith asked me in that conversation if I didn't remember the conversation we had at the mine, nor that I replied that I would not remember anything about it, nor that at the same conversation he asked me if I was going to see stakes on the hill, or that I replied that I would see more stakes on the hill than any one could find; but he did ask me if I would see stakes where Jessen put them, and I said, Yes, sir. I don't remember that he said, It takes cash to freshen up a man's memory, or that I replied, You bet it does. I don't believe I stated I had already received two hundred dollars from the plaintiff and would have four or five hundred more before I swore to any stakes. I wouldn't be positive that I didn't make the statement. I may have been drinking at the time. I was drinking when I first came into town. I don't think I said Dyer and others would have their memories refreshed in the same way.

I remember having the conversation in the cabin at the mine with Captain Whitall in the presence of Frank Keith and E. W. Keith, in which Captain Whitall asked me if Dyer had ever shown me his locations, and I believe I replied that the nearest Dyer ever came to showing me his locations was when I asked him where his locations were. He said, On that tree, throwing his arm up the hill, but not looking where he was pointing, and that I had
80 no information where his locations were. At the same conversation I told him I had letters that might be useful to the defendants; if the case comes on for trial I might destroy the letters. I told him he might destroy the letters if he wanted to.

I don't know whether I had a conversation with William Haws on the claims just after June 7th, 1889, in which Haws asked me where Dyer's locations were, and I replied, I don't know. I had sev-

eral conversations with Haws about it. If I had any conversation with Whitall and Keith in Salt Lake City I must have been drinking. I had several drinks with Captain Whitall and, I guess, with other parties. I remember meeting them several times, but don't remember what our conversation was. I met them at the Walker house and probably at other places. I don't remember what other places, unless it would be in the street. I drank with them probably two or three times. At that time we were talking about matters involved in this lawsuit, but I have no recollection of what the conversation was. I expect I had been drinking too much to recollect. I have not sold or destroyed any of the letters received by me from officers of the plaintiff company. I have one letter, though I don't know where it is. All of the others I have given to the attorneys of the plaintiff, and one is gone. Probably it wore out in my pocket and I threw it away. It was not done with the intention of concealing it. I had not been drinking when the conversation occurred at the mine referred to by me.

81 ANDREW JOHNSON, sworn as a witness in behalf of the plaintiff, testified as follows:

I reside in Uintah county, Utah Territory, and am at present working in Bingham, in Salt Lake county, and have been mining for about eleven years. I worked for the plaintiff at its mining claims in Uintah county. I went to work about the 28th day of May, 1889, and worked for the plaintiff until the 2d day of July, 1889. I was working on the lower Dyer tunnel when Haws stopped us Monday morning when we started to work as usual. Defendant William Haws was on the dump with three men. George Timothy and Frank Hauser were with him. We got there about 7 o'clock. I had been working in the same tunnel the Saturday previous. We did not work on Sunday. When we came up Monday Donoher went to Haws and asked him if he meant to jump the mine, and if he would not let us go in to work, and Haws said he had jumped the mine, and would not allow us to work. Nothing more was said, except that Donoher said, If we can't work, boys, let us go and work on the road. Haws had told us he was going to take possession. The Sunday night previous, about a mile from the claims, he asked Donoher if he would quit work. Donoher said he would not. Haws said that he would see that he would quit work, as he had to have possession of the mine.

Q. Prior to this time had Haws told you anything about his intending to take possession of the mine?

82 Defendants objected to the question as calling for immaterial and hearsay evidence as to the other defendants, and that Haws is not now interested in the controversy.

Objection overruled; to which ruling of the court the defendant then and there duly excepted.

A. Yes, sir; when we worked together in the shaft in the further winze of the main or big tunnel.

Q. How long was he working there with you?

A. A couple of weeks, or something like that.

Q. Now, what conversation did you have with him or he with you?

Defendants objected that it was immaterial and hearsay. The court overruled the objection; to which ruling the defendants then and there duly excepted.

A. Well, one day Haws said to me, Johnson, if you don't tell anybody I will tell you something I have been calculating to do for some time. Well, I said, I guess it is none of my business. He said, I am going to jump this mine. I says, Why, Bill, how can you do it? or I would not do it, or something like that, and he says, Yes; I am going to get even with the old man. Well, I says, I don't see how you can do it. He says, I can do it because Mr. Dyer has no corners, no stakes that I know of.

(Witness continuing:) This conversation was shortly before he took possession; I cannot tell how long, but it was while Haws was working for the company. When we started to work in the
83 lower Dyer tunnel Haws dropped off. After Haws took possession of the mine and about the 1st day of July, 1888, I had a conversation with him again. Haws and Donoher had a claim called the Harrison. I went to see Haws about it, and he was going to give me an interest in the Harrison for sinking so many feet. I went to the Harrison with Haws and looked at the place, and coming back we came across a stake—an old stake—rotted in one place and sharpened at one end. I said, Haws, isn't this one of Dyer's stakes? and he said, It might be, but it is lying down and it is no good. I saw the place where the stake had been standing. A few little rocks were around it. They were scattered and the hole filled up. I think the place was about a quarter of a mile southeast of the Dyer mine; I could not say exactly; I took no notice. Haws said the Harrison claim adjoined the Dyer mine. I don't know how far from the road going to the cabins the place was where I found the stake lying down. It was about a quarter of a mile from post 1, common corner of the Antietam and the Copper the Ace. I don't know how far from the Harrison claim. I went to the Harrison claim and saw the stake coming back. I saw a shaft on the Harrison, but I cannot tell how far it was from that shaft. I know it was between the Harrison and the Dyer mines. I could give no idea as to the distance from the stake to the Harrison shaft. The stake was an old one, a little rotted in one place, and sharpened.
It may have been three or four feet long and possibly three
84 or four inches in diameter. I suppose it was pine, but I never noticed, nor did I notice whether it rotted off so as to fall. I don't know whether it broke off or something knocked it off. The stake was rotted in one place. I could not say whether it was on the top or in the center. It was somebody's corner; I didn't know whose.

RICHARD POPE, being sworn in behalf of plaintiff, testified as follows:

I reside at Vernal precinct, in Uintah county, Utah, and was employed by the plaintiff in June, 1889. On Sunday, the 9th day of June, 1889, I was at Vernal. I had left the mine on the Saturday before and went to Vernal on business for the company. I returned, I believe, the following Monday night. The morning I returned I went up to the mine and found Mr. Haws in possession. He was alone there at the time. I went there to work for the plaintiff. I didn't work because Haws claimed the property and forbade my working there for Dyer. He said, I certainly forbid any work being done here on this property for Dyer; it belongs to me. He was on the claims and had a small tent pitched on the dump. He was alone that day and had a six-shooter. He made no reference to it and did not draw it or make any mention of it. I was alone on that occasion.

Q. While he, Haws, was in the employ of this company did he say anything to you as to his intending to jump the claim for relocation?

Defendants objected to the question as calling for immaterial and irrelevant testimony and as hearsay as to the other defendants, because it appears that Haws is not now interested in the claim and was not at the time of the conversation referred to.

85

The COURT: It may be received subject to the objection.

Exception by defendants.

A. Yes, sir; to the best of my recollection the conversation was only a short time before Haws took possession; we were walking over the ground when the conversation took place.

EDWARD A. FERGUSON, being sworn as a witness in behalf of plaintiff, testified as follows:

I am the vice-president and treasurer of the plaintiff corporation and have been such since its organization. I know the Antietam and the Copper the Ace mining claims, in Uintah county, Utah, claimed by the plaintiff. I was then interested in the claims under a contract with Dyer, made before he located them. In November, 1887, I was on those claims. I stayed there one day. Lewis R. Dyer was there and some workmen. I was on the ground and at the work for about two hours. I saw two notices on a tree and I saw a tunnel-location notice. We passed the tree in going from the tunnel up to the top of the hill. The tunnel I refer to is the open cut marked on the map hereto attached B. I think I saw the signature to the notices. I could not be positive as to the signature. I read them through hurriedly. All I can remember is that there were two notices of two claims, the Copper the Ace and the Antietam. I remember the names because I knew them. I don't remember the reading. At the time of the

86

visit I was interested in the property. I am engaged in the life insurance business.

Q. How much money has the company expended in working the mine from its organization to the 10th or 11th of June, 1889?

Defendants objected to this question as immaterial and irrelevant, and if it was for the purpose of showing assessment work that it was not a question of what they had expended, but the value of the work done.

Mr. DEY: I am offering it to show the good faith in working the property by the plaintiff company.

Mr. MARSHALL: There is no issue here, I take it, as to good faith.

The court overruled defendants' objection; to which ruling of the court the defendants then and there duly excepted. The court stated that it would be evidence tending to show the actual value of the improvements and subject to cross-examination.

Witness, continuing, testified that the company had expended about seven thousand dollars.

Defendants admit that plaintiff has caused to be done and performed on each claim during the years 1888 and 1889 more than one hundred dollars' worth of work.

87 (Witness continuing:) I don't remember clearly the kind of tree that these notices were on. My impression is that it was a dead tree, like all the others around there. I don't remember how tall a tree, nor whether it was a tree or a broken-off stump. I simply glanced at the notices—read them through as I was passing. I would not call it a stump. As to its being broken off I can only say I remember nothing of the sort. It made no impression upon me. I simply looked at it as I would at any other tree. I only know that the tree was somewhere towards the top of the hill, from the open cut marked B on the map hereto attached. We passed it on the way going up the hill. I don't remember how far from the cut it was. I would not have noticed the tree if my attention had not been called to it. There were old workings there. I saw one shaft, but I don't know how far from the tree the shaft was. I didn't notice that the tree was blazed. The notices were written on the tree, not on a blazed place, and were written with a kind of pencil. I don't recollect whether it was blue or black pencil.

CHARLES A. DODGE, a witness in behalf of plaintiff, testified as follows:

I was on the claim of plaintiff in August, 1890, and put up two notices there on what is supposed to be the locations as designated to me by Mr. Jessen, the engineer. The notices were put up on the 28th or 29th of August, 1890. I put them on a board. The notices

were called addendum notices. Mr. Lawson was present, and
88 he and Mr. Bohn gave them to me. The boards were nailed on stakes, and the stakes driven into the ground near the stump of an old tree.

ADOLPH JESSEN, called as a witness in behalf of plaintiff, testified as follows:

I am a surveyor. I made a survey of the mining claims in controversy. The survey was partly made on the 28th and 29th of August, 1890, and partly in the latter part of September of the same year. When there in August I caused two notices to be posted up by Mr. Dodge and Mr. Bohn. They were nailed onto the discovery stakes of the two claims, and Mr. Bohn prepared and signed the notices. I found marks and stakes connected with the Scottish Chief and the Ontario mining claims.

I found two stakes; on one was written, Discovery of the Ontario, and on the other the Scottish Chief. The point of discovery of the Ontario and Scottish Chief was within 12 feet of the discovery of the Antietam and the Copper the Ace, and standing within 20 or 40 feet of such posts. When I returned in September I found that the discovery post of the Ontario and Scottish Chief had been pulled up. The other stakes, the corner stakes, were not molested; at least, I saw two or three of them. The discovery stakes of the Antietam and Copper the Ace spoken of by me were placed there by myself in August, 1890. I know nothing about the point of discovery of the two claims except what has been told me, and placed the stakes in accordance with what was said there. The stakes were
89 placed near the stump of a tree and as close as practicable to it. That stump is about a foot or three-quarters of a foot above the ground. The tree that had fallen from it is lying down the hill. The part of the tree that was once a root lay about 12 feet from the point marked discovery of the Antietam and Copper the Ace and in a northeasterly direction, and the butt of the tree lay down the hill, right across the open part of the cut marked B on the map. I think the top of the tree had been broken off in its fall where it crossed this cut, or was cut off there, probably in order to get into the open cut. The tree had stood on the dump of a shaft or very nearly the upper part of the dump—the upper edge. It was a shaft marked X on the map hereto attached; was a southeasterly one of the three old Heater shafts. It appeared to have been a large tree, and about 60 feet high; was 21 inches in diameter. Prior to its fall the tree had not been broken off 16 or 20 feet from its roots. The entire tree fell at once, and it was an entire tree when it fell. There is no standing tree in that immediate vicinity.

Plaintiff then introduced in evidence a letter of which the following is a copy, the signature of which was admitted to be his by William Haws, and letter proved to have been received by the plaintiff company in due course of mail:

VERNAL, UINTAH COUNTY, UTAH, *June* 9, 1889.

Victoria Copper Mining Company, Chicago, Illinois.

DEAR SIRS: I have relocated the Copper the Ace and Antietam mines, situated in Carbonate mining district, Uintah county, Utah. I will commence work on the mines to-morrow. I am willing to do what is right about it, and advise you to come out and see me forthwith. Please let me know whether you are coming or not by return mail.

Yours very respectfully, WILLIAM HAWS.

Address William Haws, Vernal, Uintah county, Utah.

Marked Exhibit 4.

Plaintiff rested.

WILLIAM HAWS, a witness in behalf of defendants, testified as follows:

I reside in Uintah county, in Utah Territory. I have been mining for the past two or three years. I know Lewis R. Dyer; commenced working for him, I think, February 11, 1888, and worked at the place where he claims was his mine and is now claimed as the Antietam and the Copper the Ace. I made some locations covering a portion of what is now claimed to be the Copper the Ace and the Antietam. Prior to making those locations and about the last day of May, 1889, I stopped working for the plaintiff company. The locations were made by me on the 7th of June, 1889. I never found any of the stakes of the so-called Antietam and Copper the Ace mining claims. I looked over the ground well for stakes
91 and notices. The first time I searched the ground was about June 1st, 1889. I looked up and down the ridge towards what is now claimed to be the end of the claims for stakes, and I have been over the ground since it was surveyed by the plaintiff company—by Jessen, the surveyor who stood stakes there for a patent survey. I am familiar with the places where he set stakes; and about June 1st, 1888, I examined in the vicinity of these places and found nothing in the shape of stakes nor any place where stakes had stood, with stones piled around them nor stakes that had fallen down. I spent several days or parts of several days right along looking for stakes and notices. No one was with me. Whenever I was on the ground I spent more or less time looking for stakes. On the hill and on some of this claim I found old stakes.

There had been many old claims staked there in the immediate vicinity, but all the stakes I found, with the exception of one belonging to Charley Bocker, was blackened with age—most of them rotted off. I remember finding a stake at an old iron shaft outside of the boundaries of what is now claimed to be the Copper the Ace, but close to the boundaries of the claim. When I first saw the work it was old work. This stake, like the others, was blackened with age and weather-worn. About 40 or 50 feet from this iron shaft and on the Copper the Ace as now claimed there was an open cut, where I saw another stake. It, like the first, was blackened with age and

weather-worn, and had a date on it. We made out that to be 1880.

The new stake I saw was Lucky Boy stake, and it was close
92 to the corner marked on the map corner 2 of the Antietam.

Lucky Boy was a location of Charley Bocker, but I don't know exactly when located. The stake had the Lucky Boy written on it. None of the old stakes that I saw as before described by me could have been set up as recently as 1887. I am familiar with timber and have lived in a timber country almost all my life, and even if those stakes had been set up of dry timber, if it had been sound then and they had been faced off in any way with a hatchet, they could not have presented the appearance they did by the summer of 1888, when I saw them. The stakes were all old, black, and weather-worn. There were a good many of them all over the country, both within and without the claims as now claimed. Besides the stakes, there were many old prospect holes and cuts, and some of the old work was on the very claims now claimed by the plaintiff company. Donoher and myself made a location eas- of what is now called the Copper the Ace and where an old shaft was. I don't remember when we marked the ground off. We first called the claim the Progressive. It must have been first located about June, 1888. In April or May, 1889, we relocated it as the Harrison and then staked it off. To be sure of getting off Dyer's claim, we measured from the point open cut and B on the map hereto attached, assuming that that was the discovery—Dyer's discovery—because it was the first work that Dyer did on the ground, as I understood from Donoher. We measured fifteen hundred feet and then allowed

some additional room, to be sure to get off the claim. We
93 found no stakes at the end of 1,500 feet. We looked for the

boundaries of Dyer's claims and failed to find them. I have had various conversations with Donoher about these boundaries. I know where the Dyer cabins are, and about June 1st, 1888, at the Dyer cabin, I had a conversation with Donoher, who claimed to be the foreman of the mine and was working for the plaintiff. We were talking about making a relocation. We wanted to make a location adjoining Dyer's claims, and I asked Donoher if he knew where Dyer's notice was and he said he did not. I asked him about the stakes and he said he knew nothing about them.

Just after I had made a location, June 7, 1889, at the same place I had another conversation with Donoher about the same subject. I again asked him if he knew where the Dyer locations were or if he knew where the stakes were, and he replied that he did not. I never had any conversation with Dyer about his locations or stakes. Dyer was not around there—around the mine—a great deal while I was there; he was gone the biggest part of the time, still he was there on several occasions. The old stakes I saw were mostly hewed—that is, scored—blazed—on each side or two sides.

FRANK KEITH, being sworn as a witness in behalf of the defendants, testified as follows:

I reside in Uintah county, Utah, and am one of the defendants.

I am a mining engineer and surveyor by profession; have
94 followed that profession for about three years. I made the map introduced in evidence and marked Defendants' Exhibit 3. All the work indicated on the map was located by actual surveys made by myself. The road on the map marked road to Carter Station is a road that goes to Carter Station on the Union Pacific railroad. That road making a half circle beneath the former is the old road to Carter Station. That part towards the work on the mine is the new road. The plat correctly represents the position of the Copper King and Valao mining claims as claimed by the defendants, and the Copper the Ace and Antietam mining claims as claimed by the plaintiff. Exhibit 3 was introduced and received in evidence.

WILLIAM HAWS, being recalled, testified as follows:

When I first went on the ground in June, 1888, I saw a tree blown down across what is marked on Exhibit 3 as open cut, B. It did not present the appearance of having been recently blown down. I didn't thoroughly examine it at the time and never saw it standing. I know the point on the claims where the addendum notices of the Copper the Ace and the Antietam have recently been placed; they were placed at the root of where that tree had stood. That root may be in places a foot high. I know William W. Shaw, a witness for plaintiff in this case. I never had a conversation with him at Vernal, in front of the co-op. store or elsewhere, in
which I stated that I had relocated the claims to get from
95 the company the money they owed me, or if a man didn't keep his stakes up the claims could be relocated under the laws of Utah Territory. I never said anything to that effect or in substance. I know McLaughlin, a witness for the plaintiff here. I don't know his first name. I first saw him on the ground in controversy. He was driving — team, and I saw him on two or three occasions. He was working for Mr. Dyer. I never asked him to do any work on any claim owned by Donoher or myself for an interest in the claim, nor on the Harrison claim. I never went on the Harrison claim with him. I never walked over the hill with him. I never showed him any stake which I stated was the corner stake of the Copper the Ace claim or any corner stake whatsoever. I never told him the Harrison connected with the Copper the Ace on the end, nor did I ever have any conversation with him concerning the matter.

I know Andrew Johnson. I may have been on the Harrison claim with Andrew Johnson. I don't remember whether it was about July 1st, 1889, or not. Coming back from that claim I don't remember to have come across any old stake, and he did not ask me if such stake was one of Dyer's stakes, nor did I reply to him that it might be, but that it is lying down it is no good. I don't know McLaughlin very well. Before leaving the mine I had never spoken to McLaughlin but a few times. On the road coming out we had considerable talk together. I quit work for the plaintiff

company on the last day of May, 1889; possibly on the first day of June.

96 I conceived the idea of making the locations covering the ground now claimed as the Antietam and Copper the Ace in the fall of 1888 and while I was at work for the Victoria Copper Mining Company, and I thought of it right along after that. I had no one interested with me in it. I worked for the company as a miner under the direction of Donoher. My idea of trying to obtain the ground in this way while working for the company was for the simple reason that I could not find any stakes of Mr. Dyer's nor any location notices, nor could I find anybody that had. I didn't ask Dyer as to his stakes or notices. He was on the ground several times while I was there. The reason I did not ask him if I was honestly seeking that information was because Mr. Dyer appeared to be too important; he would not notice a man like me hardly. I cannot say I liked Mr. Dyer. I believed I knew where the headquarters of the company were at this time. I did not write the company for information because I supposed I was as apt to know about it as they; I was nearer the ground than they were. It was after Mr. Dyer showed himself so important that I began to think about getting that ground. The first step I took towards carrying out that intention of mine was to find out whether Mr. Dyer had any right to that ground or not if possible. I was doing this while in the employ of the company—receiving pay from them. In company with Heber Timothy I made the first location of the ground on the 7th day of June, 1889. We were intimate friends. He

97 offered to pay me, and I would not accept. Donoher and other men were working in lower Dyer tunnel when we put up the notices. I went on the ground again after dark on Sunday evening following, June 9th, 1889, in company with J. Timothy and Frank Orser. We stretched a tent and went to bed on the dump of the long tunnel. We stayed there all night, and in the morning when the men came up to work for the plaintiff we refused to let them work. The reason I took the men along with me was that I wanted possession of that ground and to see that there was not more than one man hopping on me at a time, if there was anything of the kind to happen. I meant by saying in letter, "Exhibit 4," "I am willing to do what is right about it" what I said, intending if Mr. Bohn or Mr. Ferguson would come out and they would put up the money for the boys that they owed and if they proved that they were honest, square men that I could trust I would give them part of this property. I calculated to give them one-half of it. I knew that it was claimed that Dyer's interest was one-half. I calculated to keep one-half of the property. I mean the company owed the men when I spoke about them owing the boys. The company owed me at the time something. That fact did not particularly influence me in any way in taking steps I did, nor to get even with Mr. Dyer exactly. The reason I made the locations was I found out to my own satisfaction that Dyer had no right to the ground, and, if he didn't, I considered I had. I obtained this information while I was in the employ of the plaintiff company.

98 In September we made new location notices and changed the name of the claim. The reason that these notices were not signed by me as well as by Mr. Timothy was that we came to the conclusion that it was business for him to put his own name. We understood after we discovered this ore that Mr. Dyer and company were going to try to win the property. I understood that on the 17th day of September, 1889. Mr. Timothy had been advised what to do; consequently my name was omitted from the location notices called the Valao and Copper King. Mr. Timothy seemingly understood the situation of affairs. I was to have the same interest in the Valoa and Copper King as if my name had appeared on the notices. These locations were made with my consent. Some of the tools of plaintiff company were on the ground when Mr. Timothy and I went there. They had been left there over Sunday in the blacksmith shop.

I commenced looking for stakes about the first of June, 1888. I wanted to make a location adjoining Dyer's location, provided he had any location there, and so I wanted to find out exactly where his ground was. Dyer was not there at the time. At that time I spent two or three days in the investigation, and afterwards I frequently hunted for stakes. I was alone while searching for stakes. Donoher had told me that he understood the claims laid up and down the ridge, and I looked principally in that direction. The country is a snowy country. There was snow there in patches in June, and it is a high altitude. I was there a part of the
99 winter of 1887 and 1888. I do not recollect what kind of winter it was exactly. I believe there was a great deal of snow, and I went out as early in the spring or summer as it was possible for me to do to make the search. The stakes I found were blackened and weather worn. One was a pine stake. One winter would not have the effect of blackening it in the way it was. Afterwards I found a stake near a little cut, about the center of what is now claimed as the Copper the Ace claim, as shown by the map hereto attached. There is a good deal of timber on this ground in places, which interfered to some extent with the investigation. I made it my business to hunt Dyer's boundaries during the time in the summer of 1888 that we were lying there doing nothing. Nobody went with me. Donoher claimed to me that he was doing the same thing—looking for stakes—but he never went with me. The last time I looked for stakes there was after Jessen's survey. Richard Pope was with me and a man by the name of Meekham, Lichter, Walton, and Nobles. I wished to look after stakes on that occasion in the immediate vicinity of where Jessen had placed the survey stakes. I don't remember ever spending an entire day at one time looking for stakes, but would spend several hours at a time, and was usually prospecting at the same time.

After 1888 I frequently saw Dyer. I kept on looking for stakes even after I had made my locations. When I went out after the Jessen survey with the men mentioned we failed to find any stakes or indication of stakes in the vicinity of the survey stakes
100 as placed there by Jessen. I did have a conversation with

Shaw at Vernal. It was in front of the co-op. store, but I think nearer Blythe's store, which is on the opposite side of the street. In that conversation I did not discuss the laws of Utah as to staking locations. I didn't state anything to the effect claimed by him. There is a good deal of fallen timber around on those claims and in that vicinity. The mountains are pretty well covered and in some places hard to get through. Generally the snow is pretty deep in winter—over four feet. On June 4th, 1889, I attended the meeting that formed the mining district. No snow slides have occur-ed on the ground in controversy, because it is not steep enough and the standing timber holds the snow. I made no inquiries of Dyer as to his boundaries, but I did inquire of others who claimed to have inquired of Dyer. In going upon the claims after Jessen's survey we found a stake near the north corner of the Antietam as surveyed. That stake was marked Lucky Boy.

HEBER TIMOTHY, a witness in behalf of defendants, testified as follows:

I reside at Vernal, Uintah county; have known William Haws about 20 years; my business generally is farming. I first went on the ground in controversy on the 7th day of June, 1889, in company with William Haws, and we then made two locations. I had never been on the ground before. On that day we looked for stakes
101 and failed to find any in the vicinity of where we set our stakes, and either that day or the next we staked off the claims located by us. We looked for stakes all over that side of the mountain, and more particularly perhaps in the vicinity of the posts set by us for the Ontario and Scottish Chief claims. I found one stake at the northwest end of the claims and near the center of the west end line of the Valao as now surveyed. It had Lucky Boy marked on it. I found some other stakes that had been put there by Haws and Donoher in making a location. These stakes had the name of the Harrison mine on them. I know William Donoher, and about the 1st of July, 1889, in a cabin called Dyer's cabin, near the ground in controversy, I had a conversation with him as to Dyer's locations. I asked him where Dyer's locations were, and he replied, Haven't you seen the record? I said, Yes; but where is the tree? And he said, Well, I don't know. That is the substance of the conversation. I never asked Dyer as to his locations, and I never knew him until coming to testify in this action. I met him in Salt Lake City.

I am twenty-nine years. The occasion of that conversation with Mr. Donoher on July 1st, 1889, was that I wanted to know whether Dyer ever put any stakes or made any location there. We claimed to have relocated the ground at that time, and I wanted to know certain whether there were any stakes there. I did not ask Dyer prior to the time; never asked Mr. Dyer; did not know him. I was never at the camp of the plaintiff company prior to June, 1889, or on the ground
102 in controversy. I am a farmer down in the valley, about 25 miles away. I had never engaged in mining or prospecting to

speak of before. The way I came to go up there in June, I heard there was a little mining excitement, and I went up there on the 5th of June. I am no relation of Mr. Haws; we are old friends. When I first went up there I went to what is called the old mill-site. Haws came there. I got there on the night of the 5th of June and he came on the morning of the 7th; and I then went up to the ground in controversy for the first time. We wrote the location notices on the ground; I think I wrote them both. At night we went back to the saw-mill. When I first went on the ground of the claim in controversy I observed from appearances that work had been done there. I did not go with Haws when he took possession; I did not know that he was going to take possession; and, another thing, I did not feel very much interested in it, because I did not value the claim. I did not consider the claim worth very much; that is one reason. Another reason was that I did not know he was going to take possession at that time; I had no intention to take possession; I left the matter with Mr. Haws. At the time I went up there Haws told me he had worked there. I saw two or three men working on what they called the lower Dyer tunnel. I did not know who they were working for; I did not ask them. I did not think at the time I went upon the ground and found men working, and found the evidence of work as I have stated, without making inquiry of them as to what they were
103 doing, etc., that it was an unusual proceeding for me to put up notices and set stakes, being told by Mr. Haws that the ground had never been located; that constituted the only source of information I had at the time that I recollect of. My position was simply of aiding Haws in doing those things. I did not know where to look for stakes on the 7th day of June, 1889; I looked where we were setting stakes and where we went. There were no stakes there except the ones I have mentioned; that is what made me look for stakes; it was not suggested to me to look for stakes; I looked for stakes before I wrote the notices. I knew where to look by following Haws; he took me right on the ground. I was present when letter Exhibit 4 was written. I saw the letter; I did not feel much interested in it. I was virtually doing just what Mr. Haws wanted me to in those matters at the time. I posted notices and set stakes for the Valao and Copper King because I did not consider these other locations in the right place. I consider that a lie on their face, stating that it was a relocation of the Antietam and Copper the Ace; and our starting point was from a stake, theirs from a tree; consequently they were at different places. The reason that Mr. Haws did not sign the Valao and Copper King notices with me was because we heard it rumored that there was going to be some trouble with the Victoria Copper Mining Company. I have forgotten how I expected to avert the trouble by leaving Haws off of them the time we were getting them fixed up. I was advised so to do; that was one of the principal reasons. Another was to
104 get the location where we wanted it. In July, 1889, at the ground in dispute defendant S. R. Whitall loaned Haws and myself some money, and several times thereafter loaned some.

JASPER N. BARR, a witness in behalf of defendants, testified as follows:

I reside in Salt Lake county. I have resided in this section of the country for about 17 years. I know Lewis R. Dyer, and met him for the first time in Uintah county, Utah Territory. I commenced to work for him on the premises in controversy about the 16th of July, 1888. At that time there were working for him Bill Donoher—he was foreman—Wm. Haws, Bill Thomas, Charles Bocker, and Brigham Sudwick. There were none of them working when I went there; they were all there, but not at work, and it was a couple of days before we commenced working. I afterwards worked with them on the claim. I continued working there until about the 1st of October, 1888. I understood they were and I was working for the plaintiff company. The only officer of the plaintiff company I met besides Dyer was August Bohn, the secretary. While there I frequently looked for the boundaries of Dyer's claims. I desired to make locations myself on the south side of him. I looked for a notice and failed to find any, and after that I looked for stakes. I cannot tell the number of times I looked, but at intervals while I was working there. On one Sunday, I remember,
105 I put in the biggest part of the time trying to locate the claims, trying to find exactly where they were. I looked more than half a dozen times. I remember the ridge there running to the northeast and southwest, and looked for stakes along the ridge. At that time, if I remember right, there was a tree fallen across an open cut, marked on the map attached hereto B, and I looked for a notice near the shafts and open cut when I first went there, because the work done on the claim appeared to be in that vicinity. The only stakes I found were some old stakes. In a southerly direction from the top of this ridge I found an old stake, a dead quaking asp that had been broken off and rotted. The roots had been placed up in the air when the stake was in position with the small part of the stake in the ground. It had then rotted off and fallen and was in that situation when I first saw it in 1888. Two other stakes I saw were both trees, one was quaking asp and the other was a pine. One of them stands not far from the Dyer works and the left of the trail as we come up from the cabin and near an old iron shaft that was sunk a short distance in the ground. It was marked with the words August, 1880, on it, and the name, I think, was Montgomery. The name of the other was the Rush Rubin. This latter was a green quaking asp tree and was growing at the time, although it had been scalped down. I had a conversation with Lewis R. Dyer as to the boundaries of his locations. I think it was in the early part of September, 1888. It was just after he came from Ashley and was in the cabin near the mine. The cabin was about a quarter of a mile from the ground in controversy. I asked him if he could walk up on the hill with
106 me and show me his boundaries. He replied, Wait; that he would get a surveyor up there and we would lay them all off together. He did not get any surveyor there nor lay the boundaries

off while I was there. While working there Donaher told told me that he did not know where the boundaries of the Copper the Ace were.

I had some conversation with August Bohn, Jr., the secretary of the company. I met him between the ground in controversy and Fort Bridger. I told him he had a man down there representing the company that was an obstructionist; that he prevented us from developing the property, and, furthermore, that he hadn't even secured the ground. I told him there was nothing there to indicate the location, neither post, location notice, or stake. Charles Bocker was working for Dyer when I was. I once heard a conversation between Bocker and Dyer with reference to the locations. This was soon after we came up from Ashley, and must have been early in September, 1888. I am not positive about the dates. I heard Bocker tell Dyer that he would be his neighbor, and Dyer asked him how that was. Bocker replied that he had made a location of a claim up above. Dyer told him that he (Bocker) was on his (Dyer's) ground, and Bocker replied go and get his instruments and come and show him his stakes, and that if he was on his ground he would move his (Bocker's) stakes. I don't remember that Dyer made any reply, nor do I know whether Bocker's stakes were moved or not. I remember seeing one of Bocker's stakes. I think his location
107 was up on top of the hill. I was discharged from the employ of the company. Mr. Dyer came over from Fort Bridger and when we were all at table told us he had concluded to suspend business; that he was out of supplies, and he would have to suspend work. Mr. Bocker was also discharged. That was the latter part of September or first of October, 1888. While in the employ of the company I prospected around there. On one Sunday I went out looking for stakes; took a canteen of water and a piece of bread and spent the biggest part of the day. I was alone. That was some time, I think, in August, 1888. I don't think Dyer was there at the time. He was on the ground a few times while I was working there and had been there previous to this Sunday and subsequently. I had no further conversation with him with reference to his stakes other than I have referred to. I did make a location while I was there. It adjoined a claim located by Haws and Donoher. They had a claim between me and the Dyer claim, as I understand. I am not positive as to the name of their claim, but I think it was the Harrison. There was a shaft on the claim, and I went there and looked at the notice. I am not positive about the name. When I had this conversation with Dyer with reference to his boundaries I am not sure whether I mentioned I had made a location or not, but at the same time I did tell him that I had made a location, and that I thought it was valuable ground and we ought to secure the ground. I don't remember when this was. Donoher and I surveyed off claim north of
108 what was supposed to be Dyer ground. Nobody informed me of general lay of plaintiff's claims. I knew where to look for stakes, for Dyer told me his claim was following the course of that ridge. I found no stakes except one 2,000 or 2,500 feet from

the top of the ridge. I did not find any stakes that were down except the one before referred to by me as having rotted and fallen. I saw Mr. Bonn while he was on his way from the claims to Carter. The "obstructionist" I referred to was Mr. Dyer. I had a five minutes' conversation with Mr. Bohn. This conversation was after Dyer had discharged me. At least he told us we could go down to Ashley; he would suspend the business. I told him I did not belong in Ashley.

CHARLES W. BOCKER, a witness in behalf of defendants, testified as follows:

I am a rancher at present. I have been mining off and on for fifteen years; principally in Nevada and Utah. I know Lewis R. Dyer, and was employed by him to work for the plaintiff company. I commenced to work for Dyer in November, 1887, and worked two or three different times up to the 1st of October, 1888. October, 1888, was the last time I did work on the claims. I did some prospecting around there on my own account and made some locations in that vicinity. I had some conversation with Dyer about the ground located by him, and as near as I can now remember about the 20th September, 1888, I had a conversation with Dyer.
109 It was a couple of days after I had located. I told Dyer I was going to be a neighbor of his, and he wanted to know how that was, and I told him I had located up above, and then he asked me whereabouts, and I told him. He said, You must be on my ground, then. Well, I didn't know whether I was on his ground or not, but I told Mr. Dyer if I was I wished he would go and show me his ground so that I could find out. He said something to the effect that he would show me his ground when he got ready. I told him all right; I would move my stakes if I was on his ground. Well, I thought it might be his ground, and finally told him it would not take long to go up and point out his stakes. I says, I will go over and help you and won't charge you anything for my services. He says, Well, never mind, I will do that when I get ready, or something to that effect. I didn't move my stakes. I looked for Dyer's stakes; tried to find out where his ground was in order to set my own; in fact, I looked for anybody's stakes that might conflict with the ground located by me. I did not find anything that induced me to think that the ground was located by any one. I found half a dozen stakes marked 1880. One was marked 1881. The stakes were old and rotten. Some of them were lying down and you could see where they had been propped up with rocks in the first place. In that vicinity we found no stakes which appeared to be placed within the ground within two years prior to 1888. Three or four miles further I found some new stakes, but in this immediate vicinity the newest ones we found were placed and marked
110 some time in the year 1881 and had rotted. I prospected over the ground pretty thoroughly in the immediate vicinity of the premises in controversy. I don't think that there was a patch of ground—I was going to say the size of this room—but I will say eight rods square that I was not on. I went up and down the ridge more

than once. I went for the purpose of seeing if I could find anybody's stakes; not Dyer's particularly or anybody else's. I didn't wish to get on anybody's ground and then have to move my own stakes; I wanted to be sure before I set my stakes. I found none of Dyer's stakes, unless the stakes more than seven years old had been set by him. I found stakes, but they were very old stakes and had rotted.

In July or August, 1888, I had a conversation with Donoher as to Dyer's stakes. This conversation was on the premises in controversy. I asked Donoher if he would help me to run my line and to set my stakes, as I thought he knew where Dyer's lines were and as he was an older miner than I and understood the lay of the mineral belt better than I. He said he could not do it. I asked him why, and he said he didn't know where Dyer's lines were.

I at present reside at Smith's Fork, in Wyoming. The country around the premises in controversy is in portions thickly set in timber. Some is sparsely timbered. The first time I worked for Dyer, in November, 1887, I think I worked twenty-five days. During that period I could not prospect much, because the snow was too deep to look around—was four or five feet deep in places, in
111 others two, and some places there was not six inches of snow. I believe I returned to work on the 3d day of July, 1888, and worked up to the time I quit. I was discharged, but had no trouble with Dyer. My location is named Lucky Boy, and I believe I made it on the 24th September, 1888, or within a day or two of that time. I don't know where Dyer's ground is to this day, but believe my location to be above his. It was above his works. I should judge it was about three hundred yards from a tunnel he started in. I didn't step it off, but I should judge it was that distance from the bottom of the hill. In a northwesterly direction from the works there is a high peak of rocks, but I didn't get to it. My claim was right above this tunnel. I believe I spent three days in succession looking for stakes. Barr was present at the conversation I had with Dyer, and I am not positive whether Donoher was or was not. It was in the cabin near the mine. I think it was about two days after I had located and had set my stakes.

RICHARD POPE, a witness in behalf of defendants, testified as follows:

I reside in Vernal, Uintah county, Utah, and know Lewis R. Dyer. I worked for the Victoria Copper Mining Company and on the premises in controversy. I have recently been to that place, which some of the defendants are in possession of. I have never worked on the property since the defendants took possession, but was working for the plaintiff at the time Haws took posses-
112 sion. I commenced to work for Dyer in August, 1888, and continued at that time for a little less than three months. I went to work again in the spring of 1889. When I was at work on the ground there was no road south of the lower Dyer tunnel, as marked on the plat. That road has been built since I left, in June, 1889. The road, as it then existed, was the one below the tunnel and

north of it. The ground is not level at that point, but rises from the lower tunnel, as marked on the map, up to the Heater shaft and beyond. I have been over the ground in controversy several times. I didn't go over it much when I first went there in 1888, but several times after. I had been at work awhile, and during 1888 I saw some old stakes in that vicinity, but nothing pertaining to the Dyer ground. Some of those old stakes had writing on them, but I never saw anything that I could read. Some of them were rotted and some of them not. They were all weather-stained and blackened where they had been chopped with an ax, and they had turned color.

I have worked in timber a great deal. The stakes I saw could not have been placed in the ground in 1887, being then dry timber and faced off with an ax or hatchet, and have presented the blackened appearance they did. I also saw some stakes of Haws and Donoher, and also some of Bocker's. I recognized the stakes by the names on them. The names were on the main stake, and the others could be told by the relation they bore to the main stake.

I don't know what was on the corner stakes. Donoher
113 showed his to me. I didn't see them all. I saw Bocker's main stake where his notice was, and it was called the Lucky Boy. I also saw another stake; it was a Lucky Boy stake, and the name was on it. It was near the northwest end of the Antietam claim, as surveyed by Mr. Jessen for patent. I don't know whether the corner stake or the center stake of the Antietam sets near it; it was one or the other. When I was last on the ground, in September of this year, I saw the stake.

I know William W. Shaw, a witness in behalf of plaintiff here, and met him at Young's Springs in the month of September, 1888. I asked him where Dyer's notice had been, and he told me that he didn't know. I talked with Donoher several times about Dyer's notices and stakes in the fall of 1888 on the ground in controversy. I asked Donoher where the stakes and notices were, and he told me he didn't know anything about it. I heard a conversation between Heber Timothy and William Donoher as to Dyer's location. That was shortly after Haws made his location, and was in the summer of 1889. It was down at the cabin near the ground in controversy. At that conversation Timothy asked Donoher where Dyer's locations were, and Donoher replied, Haven't you seen the record? and Timothy said, Yes; but where is the tree. Donoher said, I don't know. I cannot repeat every word of the conversation, but that was it in substance. Going over the ground I have gone up and down the ridge. I have been over it several times. I could not state
how many times. I have been up and down the ridge
114 during the first season I was at work and also during the second. During the second I looked more thoroughly on the side next to the road than anywhere else. I have been at the point marked open cut B on the map attached several times. There is a tree that has fallen so that the top went across that open cut and broke off. That tree was down when I first went to work for Dyer, and the first day I was on the ground I noticed it. I have been on the ground since the Jessen survey. The addendum location notices

of the Copper the Ace and the Antietam were posted by Mr. Jessen at the roots of this tree. The tree was not cut; it was broken off near the edge of the cut. Donoher showed me the stakes of the claim located by Haws and himself. Before that I had noticed the main stake where the notice was. The claim was not located while I was there. At least the first time I walked over the ground they had their location there. I believe they called it the Harrison. I am not positive whether it was called the Progressive or not. I noticed the Lucky Boy stakes myself. Bocker's claim is close to the end of the Antietam. When I walked over the ground I was usually hunting and had a gun with me. I looked over the ground more in 1889 than in 1888, but I also looked a good deal in 1888. I looked for the boundaries during the year 1888 with a view of locating myself. I wanted to stake the property adjoining the Dyer claims on the lower side, and for that reason I wished to find his lower line—that is, the side next to the road. I looked several times, but didn't search the ground as well as I did in 1889,
115 and until the latter part of June, after Haws took possession of the claims, I worked on the road. After Haws and Timothy set stakes I looked over ground. I wanted some property myself there, and I wanted to get an idea as to where the lines were, and I wished to know whether Mr. Dyer ever had that property located or not. I had worked for the company considerable, and I wished to know whether they had the ground located. I once asked Dyer where his starting point was, and he answered, That big tree; but he did not state where it was or anything about it, and I asked him nothing further. This conversation was while we were on the road between Ham's Fork and the mine. I was not so well acquainted with Mr. Dyer then as I am now. I asked him nothing about the boundary lines of his claim. He was not at the claims a great deal when I was there, but I would see him there sometimes. He was a man of few words. The country around there is timbered in some places thickly and in some places sparsely. In the vicinity of these works and where the principal work was done there is considerable timber, or was when I went there; some is now cut down and used up. At some distant day there was a fire there that burned out the underbrush and killed the timber. That timber has more or less fallen, leaving old stumps and new timber grown up. I think of the ground embraced in the Jessen survey that two-thirds of it was well-timbered ground. In some places it would bother a man to climb over the fallen trees. In some places it was very thin and very little underbrush. In some places there
116 is small quaking asp. I don't know where the largest tree is inside of the ground surveyed. There is a large tree just below the survey which, I think, is the largest tree around there. It is a big red-pine tree, standing close to the road north of the lower Dyer tunnel, close to the road. I came here as a witness for the defendants. The undergrowth there is principally quaking asp and weeds. The surface of the ground is not broken up in gullies to speak of. There is a bench running along next to the ridge, and on the northeast side of the ridge over the ridge it runs into quite

a smooth hollow until it gets down towards the lower end of the claim. Down there it drops into more of a gully. At some places you could discover stakes at quite a distance, and at some places on that ground you could not. It would be easy to see a stake at the northwest corner as shown by the Jessen survey, and it would be hard to find a stake at the corner opposite the northeast corner—that is, on the side next to the road. There is underbrush around that place. At corner 2 and corner 3 of the Antietam as the stakes were placed by Jessen they could be seen without any trouble. At corner 1 common stake between the Antietam and the Copper the Ace the stake would be readily seen. We have dug float in that immediate vicinity. At corner 4 the stake would not be seen so easily. There is much underbrush around it and some down timber. At corner 2 of the Copper the Ace the stake would not be easily seen, and at corner 3 the stake would be difficult to see, as there is
brush and timber both around there, some quaking asp, and
117 some big timber. I don't know that I was ever right on the
ground where that stake sets until after the Jessen survey. I have been on the ground prior to the survey where corner 1 common corner of the Antietam and Copper the Ace sets, and also where corner 2 sets, and was in a short distance of where corner 4 common stake to the two claims sets. I might not have been within one or two rods of it, but I was in the vicinity of it. I don't remember ever being very close to corner 3 of the Antietam. I was never where the stake sets that I remember of prior to the Jessen survey, but I have been within one or two rods of it. There is dry timber standing around it, and there is a chance for one not to see that stake unless right on the ground. In 1888 I assorted float ore and gathered float from the ground right where corner 1 common stake between the Antietam and Copper the Ace is now placed. At that time there was no stake there. That was in the fall of 1888. I have no recollection of being close to the stakes as now placed in the center of the side lines of the claim prior to the Jessen survey.

WILLIAM THOMAS, a witness in behalf of defendant-, testified as follows:

I live at Ashley, in Uintah county, Utah, and am a prospector and miner by profession; have followed that business for about fifteen years. I know Lewis R. Dyer, and worked for him on the
ground in controversy. I think I began on the second
118 day of July, 1888, and continued to work for more than
a month. While there I went over the ground in controversy and surrounding ground a good deal, prospecting and hunting. I looked for stakes in that vicinity and failed to find them. I looked especially up and down the ridge. I went over the ground, I think, three Sundays while I was in the employ of the plaintiff. In the summer of 1888, at Vernal, I met Lewis R. Dyer, and asked him where his stakes were, and he gave me no reply. If stakes had been placed along that ridge where corners two and three of the Antietam and two and three of the Copper the Ace now are, as shown by the map hereto attached, I would have found them. The con-

versation with Dyer was on the 5th or 6th of August, 1888, and after I had left the employ of the company. The only time I looked for stakes was on Sunday. Brigham Sudwick was with me a time or two. The place where I looked for stakes was within about a mile square. I saw some stakes. I was also hunting at the same time. I was principally over the ground in controversy next to the road. The stakes I found were old stakes that were put in in 1880 and 1882. I found no other stakes at all. I didn't find any Lucky Boy or Harrison stakes.

BENJAMIN HEATER, a witness in behalf of defendants, testified as follows:

In September of this year (1890) I was on the ground in controversy. I worked on the same ground in the summer of 1882
119 and 1883. The three old shafts marked Heater shafts on the map hereto attached were sunk by me in 1882 and 1883. There was at one time a large tree standing on the dump southeasterly of one of the three shafts. It is the shaft farthest up the hill. I do not know when that tree fell, but it was down in June, 1884. I saw it down at that time. I had seen it in September, 1883, standing, and when I returned in June, 1884, it was down. When I saw the ground last, this fall, the tree was still lying where it had fallen. I had not been on the ground since 1884. But the top of the tree had been chopped or broken off. I think it was the same tree and was lying over the cut. I know the trees pretty well in that country. There were other trees around there; no other very large ones right there. This was the largest tree in that immediate vicinity. This tree will probably be two feet at the butt. The largest tree is down the hill from this place and near the road. The top of this tree that had fallen had fallen right across the open cut. I made the open cut, although it has since been enlarged. This tree was standing when we left in 1883. I was there a couple of days in 1884 with a man, showing him the country. It was on this occasion I noticed the tree down.

B. R. CAMPBELL, a witness in behalf of defendants, testified as follows:

I live on "Nine Mile," in Emery county, Utah; have been a teamster for the last two or three years. I knew the copper mines
120 in Uintah county, Utah, where Ben. Heater once worked. I was there once for a short time; went there late one evening and left the next morning. It was in the fall of 1883. The place is 26 or 28 miles from Ashley. I never heard the name of the claim. I only knew Heater was prospecting there. I went into the Heater shaft late one evening—just before dark. There was a large tree standing near the shaft. I noticed the tree that night, and left my pick at the foot of the tree. That night there was a heavy wind and snow storm, and the next morning I went up to get my pick and found the tree had fallen and the limbs were over the pick. That is all I know about it. I have not been on the ground since. I was not on the ground where the tree fell for more

than half an hour. I lived at that time 26 or 28 miles away, at Vernal. I never told any one about this story except the attorneys for the defendants, and I am positive of that. I only saw the attorneys for the defendants after I came to Salt Lake. Mr. Keith, one of the defendants here, asked me to testify. I had known him about three weeks; made his acquaintance at Price, in Utah. I did speak to Mr. Keith about it, but to no one else. At the time I spoke to him I was loading freight at the depot. He asked me if I would give him an affidavit to being at the mine. I don't know how he knew I had been there. I did give him the affidavit. I don't remember whether Mr. Keith drew it or not. It was sworn to before some gentleman at Price. I cannot *not* read nor write. The
121 gentleman who swore me was present when the affidavit was read over to me.

If Heater had a cabin on the ground I did not find it. I was subpœnaed to come here as a witness. After I had taken the affidavit at Price Mr. Keith paid me ten dollars. He promised me nothing before I made the affidavit; afterwards voluntarily gave it to me, I presume, for the time I had spent. I didn't expect it beforehand. I cannot remember what the affidavit said. I have not had any education, and I haven't got a good memory.

LOUIS V. SHURTLIFF, a witness in behalf of defendants, testified as follows:

I reside at Fort Bridger, Wyoming, and have a contract for carrying the United States mail. I know Lewis R. Dyer. I first met him on Henry's Fork. I have never been on the premises in controversy. I did some freighting for the plaintiff over the line over which I carry the mail, and in that way the plaintiff became indebted to me. About the first of July, 1889, at Carter Station, in Wyoming, I had a conversation with Lewis R. Dyer with reference to my claim against the plaintiff. I wished it paid. Andrew Holman was present. Dyer told me that if I wanted to get my pay I would have to get it out of the property left there; that he had given everything up and he supposed the plaintiff had also. A few days afterwards I had another conversation with him at the same place, in which I asked him if he was going over to the mine. He
122 said no; not then. He also said that he could not do anything if the Haws party had the claims staked; that he had never had them staked. I believe a man by the name of Robert Wilson was present at this conversation last referred to. I know the man was there, but I am not certain as to his name. Dyer refused to pay me my money, and I afterwards obtained it by attaching the property, consisting of wagons left by the company in charge of Henry. I am acquainted with the defendant Captain Whitall; had a conversation with him about this matter at Fort Bridger.

ELBRIDGE C. NORRIS, a witness in behalf of defendants, testified as follows:

I reside in Salt Lake City, Utah, and have been engaged in min-

ing ever since 1876, principally in Colorado and Utah. I know Lewis R. Dyer, and have known him by reputation ever since 1880 and personally since 1889, both in Denver and in Leadville. In July, 1889, I met him in company with a man by the name of Reynolds, from Chicago, in the Resort saloon, in Salt Lake City. I was looking for him at the time in regard to some copper property that it was said he had for the St. Helena Smelter Company of Trinidad. I found that he was registered at the Cullen hotel and went around there looking for him. When I found him I told him I had been looking for him and wished to see him in regard to the copper property and asked him if he was still working it, and he said he was not; that he had given it up; that the Chicago parties
123 had gone back on him. I understood the property to be situated in Uintah county, Utah Territory, in the camp we used to call Bullion in 1880. I was last in that camp in the month of August, 1880 or 1881. I have forgotten which.

FRANK KEITH, a witness in behalf of defendants, being recalled, was sworn and testified as follows:

I know the ground in controversy and am familiar with the roads. The road south and up the hill from the mouth of the lower Dyer tunnel, as shown on the map hereto attached, was made in July, 1889. The road north of the lower Dyer tunnel was the old road. I know William Donoher. He was working for Haws as a miner in June, 1889, after Haws took possession of the ground, and I had a conversation with Donoher in reference to the plaintiff's claims about the 25th of October, 1890, in Salt Lake City, in front of the Cullen hotel, and in the presence of W. V. R. Whitall. Mr. Donoher stated to me in substance that he was going to see stakes on the hill and would see more than any person could find, and would see them where Jessen had placed them, and also in substance that it takes cash to freshen up a man's memory; that he had received two hundred dollars from the plaintiff and would have four or five hundred more before he swore to anything, and, further, that Dyer and the others would have their memories freshened up in the same way. These were not his exact words, but were the substance of what he said.

124 SAMUEL WHITALL, being sworn as a witness in behalf of defendants, testified as follows:

I am a captain in the United States Army, and stationed at Fort Douglas, Utah. Prior to two months ago I was stationed at Fort Duchesne, in this Territory, in Uintah county. I know the premises in dispute, and have known them since June, 1889. I am familiar with the roads leading to the claims. The road shown on the map running south of the lower Dyer tunnel was first constructed in the summer of 1889; I think as late as August. It is a dugway. The hill at that place slopes to the northeast so sharply that it would be impracticable to go over the ground with a loaded wagon prior to the construction of this dugway. The ground is rocky and to some extent dug up. The road as shown on the map

hereto attached and north of the mouth of the lower Dyer tunnel was the only road there prior to the summer of 1889. I am one of the defendants in this action. I know William Donoher. At the Dyer cabins, near the ground in controversy, Donoher stated to me in the presence of Frank Keith that the nearest Dyer ever came to showing him (Donoher) his locations was once when he asked Dyer where the locations were, and Dyer said, On that tree, throwing his arm up the hill, but not looking the way he had pointed, and he, Donoher, never knew where the locations were. This conversation was in August, 1889. Donoher was then working as a miner in the Valao tunnel. Donoher was sitting in the cabin at the time
125 I had the conversation with him. He was at that time in the employ of Mr. Smith, Frank Keith, Thad. Keith, my son, and myself. I was first up to the claims in July, 1889. I stayed with Haws. Timothy was also there.

LEWIS R. DYER, being called in rebuttal, testified in behalf of plaintiff as follows:

I know Elbridge C. Norris, who has testified in behalf of the defendants. I met him in Salt Lake City in June, 1889, on the sidewalk near the Walker house. I heard his testimony this morning as to a conversation with me in a saloon. I had a conversation with him, but not the conversation he described. The conversation I had with him was in the St. Louis beer hall, below the Walker house, near the Clift house. I first met him that afternoon. The conversation we had was about some man who was here buying copper ore for the St. Helena smelter, at Trinidad. Norris told me where I could find him. I went up to hunt for him and found that he had left the city that morning. That portion of his testimony in which he refers to any abandonment is an absolute, unqualified, and unmitigated lie; also that portion of his testimony which referred to the Chicago man.

AUGUST BOHN, being called as a witness in behalf of plaintiff, in rebuttal, testified as follows:

I am the secretary of the plaintiff company and have been such since its organization. I reside in Chicago. I am somewhat
126 of a photographer. I have been taking photographs for pleasure since I got my first camera, in 1880, in Boston. I have taken pictures off and on since then for my own pleasure and amusement. I was on the ground in controversy in the latter part of September, 1888. I was also there the first part of October of the same year. While there I took some photographs with a camera. The photographs handed me I identify as being the photographs I took. The photographs are photographs of the ground in controversy.

Plaintiff then offered in evidence the photographs so taken, and stated that they were offered to show both the nature of the country as to the wood, fallen timber, and the like, and that there was no

tree lying across the mouth of the open cut at the time when these pictures were taken.

Defendants objected to the introduction of these photographs, on the ground that they were immaterial and irrelevant and not proper evidence.

The objection was overruled by the court; to which ruling the defendants took exception.

The photographs were admitted in evidence and purported to show the ground in controversy.

Defendants proved that on June 7, 1889, William Haws and Heber Timothy went on the ground in controversy and then and there posted two notices of location of two certain mining claims, called Scottish Chief and Ontario mining claims, described in the said notices as relocations of the Antietam and Copper the Ace Lode mining claims respectively, and that such notices were
127 in proper form. Plaintiff admitted that on the same day or the day following said Haws and Timothy discovered a mineral-bearing vein of copper ore in place within the limits of the claims, and sufficiently staked the boundaries of said claims so that the boundaries thereof could be readily traced, and thereafter duly filed for record in the office of the mining recorder of the Carbonate mining district, in which said premises were located, copies of such location notices. Plaintiff also admitted that on September 12, 1889, said Haws and Timothy posted location notices of the Valao and Copper King mining claims, describing the claims as the same as are now claimed by the defendants herein and as shown by the map hereto attached, and that the boundaries of said claims and each of them were sufficiently marked and staked so that the boundaries thereof could be readily traced. Said location notices were not defective in form or substance, and that they were thereafter duly recorded in the proper office, and that at the time of posting said last-named notices they had discovered within the limits of the said claims so marked on the ground a vein of ore in place bearing copper.

The foregoing, together with Exhibits C and D and the map, Exhibit 3, is the substance of all the evidence tending to support the findings which are pointed out in the defendants' specification of errors as not supported by the evidence and the substance of all the evidence pertaining to or illustrating defendants' assignments of error.

128 The cause having been submitted to the court for its decision, the court made and filed its findings of fact and conclusions of law, in which judgment was awarded in favor of plaintiff and against defendants.

Said findings of fact and decision in writing were made and filed by said court on the 24th November, A. D. 1890.

That on December 3d, 1890, defendants duly served and filed a notice of their intention to move for a new trial of said action, which is in words and figures following, to wit:

UTAH TERRITORY, } ss:
Salt Lake County, }

In the District Court of the Third Judicial District.

VICTORIA COPPER MINING COMPANY, Plaintiff, }
vs.
WILLIAM HAWS *et al.*, Defendants. }

To the plaintiff and to Charles C. Dey, its attorney:

You are notified that the defendants intend to and will move the court to vacate and set aside the findings and decision herein
129 rendered against them and in favor of the plaintiff on the 24th day of November, A. D. 1890, and to grant a new trial of the action on the following grounds:

1. Irregularities in the proceedings of the court and an abuse of discretion in the court by which defendants were prevented from having a fair trial.

2. Insufficiency of the evidence to justify the findings and decision.

3. Newly discovered evidence material to defendants and which could not with reasonable diligence have been discovered and produced at the trial.

4. That the findings are against law.

5. Errors in law occurring at the trial and excepted to by defendants.

Said motion will be made on affidavits hereafter to be filed and served on you and upon a statement of the case hereafter to be prepared and served on you.

BENNETT, MARSHALL & BRADLEY,
Attorneys for Defendants.

That on the same day the court by its order duly made and given extended the time within which the defendants might prepare and serve its statement on the motion for a new trial of said action, and affidavits so far as the ground of said motion might be newly discovered evidence, until and including the 20th day of January, A. D. 1891.

130 *Specification of Particulars in which the Evidence is Insufficient to Support the Findings.*

The third finding is unsupported by the evidence in this, that the weight of said evidence from witnesses who were on the ground in dispute shortly after the alleged location of the claim, and also from the admission made by the said Dyer, shows that no location notices were written on a tree or on anything else upon the premises in dispute.

The fourth finding is unsupported by the evidence in this, that it appears affirmatively from the evidence that the tree referred to in the recorded location notices could not be ascertained on the ground, as many trees were standing around; that in no respect was that

tree such a monument or fixed object that the boundaries of the claim could have been determined from it, and that it did not mark the claims or either of them so that the boundaries could be identified.

The fifth finding is unsupported by the evidence in this, that it affirmatively appears from the evidence that the said Dyer in no way marked plaintiff's alleged locations upon the ground, and that the same were never staked until August, 1890, long after defendants' locations.

The sixth finding is unsupported by the evidence so far as it finds that the copy of any location notice actually written or posted on the ground was filed for record, the evidence affirmatively showing

131 that no such location notice was ever posted on the ground or written on a tree or elsewhere on the ground in dispute, and also that the claimed location notices filed for record in the office of the county recorder were written in Salt Lake City in February, 1888, and were not copies of anything.

The tenth finding is unsupported by the evidence in so far as it finds that the defendant Wm. Haws ever wrongfully took possession of the premises in controversy, or that any of the defendants ever wrongfully excluded the plaintiff therefrom, or that the plaintiff was in possession of the premises when the defendant William Haws took possession, as the evidence shows affirmatively that the possession taken by said Haws was rightfully taken; that the premises were vacant at the time, and that defendants have rightfully maintained the same in pursuance of their title thereto.

The twelfth finding is unsupported by the evidence in so far as it finds that at the time of the location made by said Haws and Timothy on the 7th day of June, 1889, the premises were in the actual possession of the plaintiff, the evidence showing that at that time the plaintiff was only working at the lower Dyer tunnel; that plaintiff's alleged claims were not marked on the ground, and that plaintiff's possession did not extend beyond *pedis possessio*, and the evidence shows that at the time Haws entered into possession of the ground in controversy the plaintiff was not in any actual possession whatsoever and had no man in actual possession of the ground.

The fourteenth finding is unsupported by the evidence in

132 so far as it finds that defendant Timothy set a stake within the limits of the boundaries of plaintiff's mining locations, because the evidence shows that at that time plaintiff had no locations on the ground in controversy.

The seventeenth finding is unsupported by the evidence in so far as it finds that plaintiff caused its stakes to be reset, because the evidence shows that prior to that time plaintiff had never set any stakes, and also is unsupported by the evidence in so far as it finds that plaintiff caused to be posted at the place of discovery on the 29th August, 1890, an addendum notice to each of the original notices of location, because the evidence shows that plaintiff never had any original notices of location posted on the claims at any place.

The nineteenth finding is unsupported by the evidence in so far as it finds that the defendants ever wrongfully extracted or carried

away any ore from plaintiff's mining claims, because the evidence shows that while defendants extracted and carried away ore from the ground in controversy they did it rightfully after their said location and ownership of the ground, and because the evidence shows that plaintiff never had any title to the ground or ever made any location thereon.

Assignment of Errors of Law Occurring at the Trial and Duly Excepted to by the Defendants.

1. The court erred in overruling defendants' objection to
133 the introduction in evidence of Exhibits C and D, hereto attached, and in permitting the same to be introduced in evidence.

2. The court erred in permitting the introduction of said exhibits subject to the objection and in not finally ruling thereon, and such action of the court was an irregularity which prevented the defendants from having a fair trial.

3. The court erred in permitting the witness McLaughlin to testify that the defendant William Haws showed him the Harrison claims and in overruling defendants' objection thereto, and also in permitting the same witness to state that the defendant Haws had showed him a stake which he claimed was a corner stake of the Copper the Ace claim and in overruling defendants' objection thereto.

4. The court erred in only ruling on the above objection subject to the objection and in not making any final disposition of said objection in the trial of said action, and the same was an irregularity in the proceeding of the court by which the defendants were prevented from having a fair trial.

5. The court erred in permitting the witness William C. McLaughlin to answer the question, "Were you shown any stakes by Mr. Dyer?" and in overruling defendants' objection thereto.

6. The court erred in overruling defendants' objection to the question asked the witness Donoher, "Have you or the defendant Haws ever located any mining claims in that vicinity?" and in permitting the witness to answer the same.

134 7. The court erred in permitting the witness Andrew Johnson to answer the question, "Prior to this time had Mr. Haws told you anything about his intending to take possession of the mine?" and in overruling defendants' objection thereto.

8. The court erred in permitting the same witness to answer the question, "Now, what conversation did you have with him or he with you?" and in overruling defendants' objection thereto.

9. The court erred in permitting the witness Richard Pope to answer the question, "While he was in the employ of this company did he ever say anything to you as to his intending to jump the claim for relocation?" and in overruling defendants' objection thereto. The court also erred in admitting this testimony subject to the objection and in failing to make any final ruling thereon, and the same was an irregularity in the proceeding of the court which prevented the defendants from having a fair trial.

10. The court erred in permitting the witness E. A. Ferguson to answer the question, "How much money has the company expended in working the mines from its organization to the 10th or 11th day of June, 1889?" and in overruling defendants' objection thereto.

11. The court erred in admitting in evidence the photographs taken by August Bohn, Junior, and in overruling defendants' objection to their admission.

BENNETT, MARSHALL & BRADLEY,
Attorneys for Defendants.

135 Time within which to prepare and serve the foregoing statement on motion for a new trial having been duly extended, the said statement, together with exhibits hereto attached, is now hereby settled and allowed as and for defendants' statement on motion for a new trial of this action.

Dated February 13th, 1891.

(Signed) T. J. ANDERSON, *Judge.*

EXHIBIT C.

The undersigned hereby gives notice that he claims 1,500 by 600 feet of this the Copper the Ace lode, with all the dips, spurs, angles, and variations, situated in Carbonate mining district, Uintah county, Utah Territory, from this tree northeasterly 300 feet, thence southeasterly 1,500 feet, thence southwesterly 600 feet, thence northwesterly 1,500 feet, thence northeasterly 300 feet to the place of beginning.

September 17th, 1887.

LEWIS R. DYER.

Recorded at the request of Lewis R. Dyer this 13th day of February, A. D. 1888, at 10 o'clock a. m., in Book I of Records, page 96.

PHIL. STRINGHAM,
Recorder Uintah County.

EXHIBIT D.

The undersigned hereby gives notice that he claims 1,500 by 600 feet of this the Antietam lode, with all the dips, spurs, angles, and variations, situated in Carbonate mining district, Uintah county, Utah Territory, from this tree northeasterly 300 feet, thence northwesterly 1,500 feet, thence southwesterly 600 feet, thence southeasterly 1,500 feet, thence northeasterly 300 feet to the place of beginning.

September 17th, 1887.

LEWIS R. DYER.

Recorded at the request of Lewis R. Dyer this 13th day of February, A. D. 1888, at 9 o'clock a. m., in Book I of Records, page 95.

PHIL. STRINGHAM,
Recorder Uintah County.

(Here follows map marked p. 136.)

Statement on motion for new trial was endorsed: Title of court and cause. Filed February 13th, 1891. Henry G. McMillan, clerk.

136½ TERRITORY OF UTAH, } ss:
County of Salt Lake, }

In the District Court of the Third Judicial District.

THE VICTORIA COPPER MINING COMPANY, Plaintiff, *vs.* WILLIAM HAWS *et al.*, Defendants. } In Open Court. Feb'y 13, 1891.

Comes on now to be heard the motion of the defendants for a new trial herein, and said motion is heard upon the record and statement and upon the affidavits filed by defendants in support of their motion and upon the arguments of C. W. Bennett, appearing as attorney for defendants, and C. C. Dey, appearing as attorney for plaintiff, and the court being fully advised is of the opinion that no sufficient reason for granting a new trial is shown. It is ordered and adjudged that said motion for a new trial be, and the same is hereby, overruled. Defendants except.

137 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

In the District Court of the Third Judicial District.

THE VICTORIA COPPER MINING COMPANY, Plaintiff, *vs.* WILLIAM HAWS *et al.*, Defendants.

To the above-named plaintiff and to its attorneys, Messrs. C. C. Dey and E. D. R. Thompson:

You are notified that the defendants' appeal to the supreme court of Utah Territory from the whole and every part of the judgment rendered herein in favor of the plaintiff and against the defendants on November 24th, 1890, and from the whole and every part of the order made herein February 13th, 1891, overruling defendants' motion for a new trial and refusing a new trial of the action.

BENNETT, MARSHALL & BRADLEY,
Attorneys for Defendants.

Dated February 28th, 1891.

Endorsed: Title court and cause. Notice of appeal. Copy received March 3rd, 1891. Chas. C. Dey, pl't'ff's att'y. Filed March 2nd, 1891. Henry G. McMillan, clerk, by Geo. D. Loomis, dep.

138 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

In the District Court of the Third Judicial District.

VICTORIA COPPER MINING COMPANY, Plaintiff,
vs.
WILLIAM HAWS, HEBER TIMOTHY, EDWARD W. KEITH, FRANK A. Keith, Samuel R. Whitall, William V. R. Whitall, and Michael E. Smith, Defendants.

Whereas the defendants in the above-entitled action are about to appeal to the supreme court of Utah Territory from the whole and every part of the judgment herein rendered on November 24th, 1890, in favor of the plaintiff and against the defendants, and from the whole and every part of the order made on February 13th, 1891, overruling the defendants' motion for and refusing a new trial of the action:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned defendants, as principals, and A. Hanauer and P. Mulrooney, of Salt Lake county, Utah, as sureties, do hereby, jointly and severally, undertake and promise on the part of
139 the appellants that the appellants will pay all damages and costs which may be awarded against them on the appeal or on a dismissal thereof not exceeding three hundred dollars, to which amount we acknowledge ourselves, jointly and severally, bound; and

Whereas the said appellants are desirous of staying the execution of said judgment so appealed from as to the amount of costs and damages, to wit, $1,692.17, adjudged in favor of the plaintiff and against the defendants:

Now, we do further, in consideration thereof and of the premises, jointly and severally, undertake and promise and do acknowledge ourselves further, jointly and severally, bound in the further sum of $3,384.34, being double the amount named in said judgment for said costs and damages, that if the judgment appealed from or any part thereof or the order appealed from in that respect be affirmed or the appeal be dismissed the appellant- shall and will pay the amount directed to be paid thereby or the part of such amount as to which the same shall be affirmed if affirmed only in part and all damages and costs which shall be awarded against the appellant upon the appeal, and that if the appellants do not make such payment within thirty days after the filing of the remittitur from the supreme court in the court from which the appeal is taken judgment may be entered on motion of the respondent in its favor and against the undersigned sureties for such amount, together with the interest that may be due thereon and the damages and costs which may be awarded against the appellants on the appeal; and

140–150 Whereas said judgment appealed from is also for the recovery by the plaintiff of the defendants of certain lands and premises therein described and referred to; and

Whereas the appellants are desirous of staying the execution of

said judgment appealed from in so far as the same related to the possession of said lands and premises; and

Whereas this court has, for the purpose of staying the execution upon said judgment in all respects, ordered that the appellants shall furnish and file herein an undertaking in the total sum of five thousand dollars ($5,000) for the purpose of such stay:

Now, therefore, in consideration thereof and of the premises, we do further, jointly and severally, undertake and promise and do acknowledge ourselves further, jointly and severally, bound in the further sum of $1,615.66 (that being the balance of the amount for that purpose fixed by the judge of this court as aforesaid) that during the possession of said property by the appellants they will not commit or suffer to be committed any waste thereon, and that if the judgment be affirmed or the appeal dismissed the appellants will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof pursuant to the judgment or order not exceeding the sum of $1,615.66, the balance of the amount so as aforesaid fixed by the judge of the court by which said judgment was rendered.

151 Dated Feb'y 28th, 1891.

WILLIAM HAWS,
HEBER TIMOTHY,
EDWARD W. KEITH,
FRANK H. KEITH,
SAMUEL R. WHITALL,
WM. V. R. WHITALL,
MICHAEL E. SMITH,
By BENNETT, MARSHALL & BRADLEY,
Attorneys.

P. MULROONEY.
A. HANAUER.

TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

A. Hanauer and P. Mulrooney, being each first duly sworn, each for himself on his oath says: I am one of the sureties name- in and who subscribed to the foregoing undertaking. I am a resident and householder within Utah Territory, and I am worth the sum specified in the foregoing undertaking, to wit, the sum of $5,300, over and above all my just debts and liabilities, exclusive of property exempt from execution.

A. HANAUER.
P. MULROONEY.

Subscribed and sworn to before me this 28th day of February, A. D. 1891.

W. M. BRADLEY,
Notary Public, Salt Lake County, Utah.

Endorsed: Title of court and cause. Undertaking on appeal. Filed March 2nd, A. D. 1891. Henry G. McMillan, clerk, by George D. Loomis, deputy.

152 Title, Cause.

The time for filing the foregoing transcript is hereby extended until and including April 10th, 1891.

Dated April 1st, 1891.

T. J. ANDERSON, *Judge.*

We hereby certify that the foregoing is a correct transcript of the record in the case of Victoria Copper Mining Company, plaintiff, *vs.* William Haws *et al.*, defendants.

(Signed) BENNETT, MARSHALL & BRADLEY,
Att'ys for Defendants and App'l'nts.

" CHAS. C. DEY,
Att'y for Pl'ff and Respondent.

Endorsed on cover: Title of court and cause. Transcript of appeal. Filed April 9th, 1891. Henry G. McMillan, clerk. Filed in the supreme court April 9th, A. D. 1891, at Salt Lake City, Utah. Joseph P. Bache, clerk.

153 In the Supreme Court in and for the Territory of Utah, June Term, 1891.

SATURDAY, *June 13th.*

VICTORIA COPPER COMPANY, Respondent,
vs.
WILLIAM HAWS *et als.*, Appellants.

This cause was this day submitted on briefs by both parties and by the court taken under advisement.

June Term, 1891 (Adjourned Session).

SATURDAY, *September* 12.

VICTORIA COPPER MINING COMPANY, Respondent,
vs.
WILLIAM HAWS *et als.*, Appellants.

This cause having been heretofore submitted on briefs by both parties, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed with costs.

154 Thereupon counsel of appellants prayed the allowance of an appeal from the judgment rendered herein in this court to the United States Supreme Court, and asked that the bond to be given thereon be now fixed, and it was ordered, counsel for respondent being present and not objecting thereto, that such appeal be, and is hereby, allowed, and the bond to be given thereon is fixed in the sum of ten thousand dollars and the bond for costs in the sum of three hundred dollars.

155 In the Supreme Court of Utah Territory.

VICTORIA COPPER MINING COMPANY, Respondent,
vs.
WILLIAM HAWS *et al.*, Appellants.

BLACKBURN, *J.*:

The abstract in this case is very imperfect. The names of the parties defendants are not set out. It does not purport to be an abstract of all the evidence given at the trial. It assigns errors in the findings of fact by the trial court by numbers, without setting out the findings. It only gives the findings as a whole, without designating them by numbers. The purpose of an abstract of the record is to enable the court of appeals to decide the case without the labor of the examination of a voluminous record. This abstract only increases instead of lessening the labor of the court.

This suit was brought to recover the possession of two mining claims—the Copper the Ace and the Antietam—and for damages, and was tried by the court without a jury, a jury being waived.

156 The court found for the plaintiff company, and rendered judgment accordingly. The defendants made a motion for a new trial, which was overruled, and defendants appealed, both from the order overruling the motion for a new trial and the judgment, and assigned many reasons for reversing the judgment, to wit, errors of law in this, that irrelevant, immaterial, and incompetent evidence was heard by the court, some of which was admitted subject to the objections, and to some the objections were overruled.

When the judge tries a case without a jury it is not a reversable error to admit incompetent, irrelevant, or immaterial evidence; for he decides the case on the proper testimony only and disregards entirely that which is incompetent, irrelevant, and immaterial.

When a clear preponderance of competent, relevant, and material evidence supports the findings this court will not reverse because of errors of the court below in admitting incompetent, irrelevant, or immaterial evidence, for the presumption in such case is that it was wholly disregarded.

Insurance Company *vs.* Friedenthal, 27 Pacific Reporter, p. 88.

This disposes of all the exceptions taken to the reception of evidence claimed to be improper.

We have carefully looked through the record and considered all the evidence; and, although we are not entirely satisfied with the findings of the trial court, yet we cannot say as a matter of law that

157 they are wrong. There is enough evidence in the record, if true, to support the findings and judgment. It is very contradictory; and we think the trial judge who saw the witnesses on the stand and noticed their manner and bearing and doubtless attended closely to all the surroundings is better qualified to judge of what testimony is truthful than this court, who has only an imperfect abstract of it in the record.

One witness testifies in detail to all the circumstances of locating

the claims, and if what he says he did was really done the location of the claims was complete. The defendant Haws looked for stakes afterwards, but did not find any, and so said several witnesses; but Haws quit work for the plaintiff company on the claims a very few days before he attempted to relocate them, and it is not at all improbable that a man will not see stakes when he is looking for them, who will deliberately undertake, while in his pay, to appropriate his employer's property to his own use. Again, it is not disputed that the defendant Haws took possession of the property and ousted the plaintiff while its agents were actually working on the claims.

We do not think we ought to reverse the judgment because it is alleged it is not supported by the evidence, because we think that a clear preponderance of the evidence does support it. A further review of the evidence would be profitless.

Another contention of the defendants is that the court in this case during the progress of the trial received certain evidence subject to the objections of the defendants, and did not afterwards specifically rule upon these objections and left the contestants in doubt as to whether he considered such evidence in making his judgment. Many authorities are cited in support of this contention.

158

It is fully supported by Californian authorities, but no other is cited in its support.

This question need not be passed upon in this case, for the neglect to decide each of the objections made to the testimony would and could not have changed the result; and if it was error in this case it was harmless, for which an appellot- court will not reverse; for if the trial court believes the competent evidence unobjected to introduced by the plaintiff he must have decided as he did, and it could make no difference which way he decided the questions of the admissibility of the evidence objected to.

We see no error in the record that justifies a reversal. Therefore the judgment is affirmed.

We concur.

C. S. ZANE, *C. J.*

MINER, *J.*

Filed September 12th, 1891.

JOSEPH P. BACHE, *Clerk.*

159 The United States of America to Victoria Copper Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at Washington within sixty days from the date of this citation, to answer the appeal in that certain action wherein William Haws, Heber Timothy, Edward W. Keith, Frank A. Keith, Samuel R. Whitall, William V. R. Whitall, and Michael E. Smith are appellants and you are respondent, to show cause, if any there by, why the judgment of the supreme court of the Territory of Utah in that certain — in said

court wherein you are plaintiff and respondent and the said William Haws *et al.* were defendants and appellants should not be reversed and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Salt Lake City, Utah, this 1st day of October, A. D. 1891.

C. S. ZANE,
Chief Justice, Utah Territory.

Due service of the above citation is hereby acknowledged October 2d, A. D. 1891.

CHAS. C. DEY,
Attorney for the said Victoria Copper Mining Company.

159½ [Endorsed:] Supreme court, Utah. Victoria Copper Mining Company *vs.* Wm. Haws *et al.*, appellants. Citation. Original. Filed in the supreme court Oct. 2, 1891, at Salt Lake City, Utah. Jos. P. Bache, clerk.

160 In the Supreme Court of Utah Territory.

VICTORIA COPPER MINING COMPANY, Plaintiff and Respondent,
vs.
WILLIAM HAWS, HEBER TIMOTHY, EDWARD W. KEITH, FRANK A. KEITH, SAMUEL R. WHITALL, WILLIAM V. R. WHITALL, and MICHAEL E. SMITH, Defendants and Appellants.

The above-named appellants, conceiving themselves aggrieved by the judgment of the supreme court of Utah Territory, entered on the 12th day of September, 1891, in the above-entitled action, do hereby appeal from said judgment to the Supreme Court of the United States and pray that their appeal may be allowed and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

BENNETT, MARSHALL & BRADLEY,
Attorneys for Defendants and Appellants.

I hereby acknowledge service of a copy of the above this 2nd day of Oct., A. D. 1891.

CHAS. C. DEY,
Att'y for Victoria Copper Mining Co.

160½ [Endorsed:] Supreme court of Utah. File No., 186. Victoria Copper Mining Co. *vs.* Wm. Haws *et al.* Prayer for allowance of appeal, etc. Filed in the supreme court Oct. 2nd, 1891, at Salt Lake City, Utah. Jos. P. Bache, clerk.

161 In the Supreme Court of Utah Territory.

VICTORIA COPPER MINING COMPANY, Plaintiff and Respondent,
vs.
WILLIAM HAWS, HEBER TIMOTHY, EDWARD W. KEITH, FRANK A. Keith, Samuel R. Whitall, William V. R. Whitall, and Michael E. Smith, Defendants and Appellants.

Whereas said William Haws, Heber Timothy, Edward W. Keith, Frank A. Keith, Samuel R. Whitall, William V. R. Whitall, and Michael E. Smith, the defendants in the action above entitled, are about to appeal to the Supreme Court of the United States from the whole and every part of the judgment herein rendered in the supreme court of Utah Territory on the 12th day of Sept., 1891, in favor of said Victoria Copper Mining Company and against the said defendants and appellants herein:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, A. Hanauer and P. Mulrooney, of Salt Lake City, Utah Territory, do hereby, jointly and severally, undertake and promise on the part of the defendants and appellants that the said appellants will pay all damages and costs which may be awarded against them on the appeal or on a dismissal thereof not exceeding the sum of three hundred dollars; to which amount
162 we acknowledge ourselves, jointly and severally, bound; and

Whereas the said appellants are desirous of staying the execution of said judgment appealed from and of superseding the same; and

Whereas the said judgment was for the recovery by plaintiff of defendants of certain lands and premises as well as for the recovery of certain money therein specified; and

Whereas the court has, for the purpose of staying the execution upon said judgment in all respects, as well for the recovery of said land as for the payment of said money, ordered that the appellants herein shall furnish and file herein an undertaking on this appeal in the sum of ten thousand dollars for the purpose of such supersedeas:

Now, therefore, we do further, in consideration thereof and of the premises, jointly and severally undertake and promise and do acknowledge ourselves, jointly and severally, bound in the further sum of ten thousand dollars that if the said judgment appealed from or any part thereof be affirmed or the appeal be dismissed the appellants will and shall pay the amount directed to be paid thereby or the part of such amount as to which the same shall be affirmed if affirmed only in part and all damages and costs which shall be awarded against the appellants upon the appeal;

And also that during the possession of said property by the appellants they will not commit or suffer to be committed any waste thereon, and that if the judgment be affirmed or the appeal
163 be dismissed the appellants will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof pursuant to the judgment, not

exceeding the said sum of ten thousand dollars, so fixed by said court.

In witness whereof we have hereunto set our hands and seals, at Salt Lake City, Utah, the day and year first herein written.

(Signed) A. HANAUER. [SEAL.]
" P. MULROONEY. [SEAL.]

In presence of—
J. BARNETT.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

A. Hanauer and P. Mulrooney, being each duly sworn, each for himself on his oath says that he is a freeholder and resident of Salt Lake City, Salt Lake county, Utah Territory; that he is worth the amount named in the foregoing undertaking as the penalty thereof, to wit, ten thousand three hundred dollars, over and above all his debts and liabilities, exclusive of property exempt by law from execution.

(Signed) A. HANAUER.
" P. MULROONEY.

Subscribed and sworn to before me this 1st day of October, A. D. 1891.

JOSIAH BARNETT,
[SEAL.] *Notary Public, Salt Lake County, Utah T'y.*

Approved.
C. S. ZANE,
Chief Justice Supreme Court Utah.

Endorsed: Title of court and cause. Bond in supersedeas and for costs. Filed Oct. 1st, 1891. Jos. P. Bache, clerk.

164 In the Supreme Court of Utah.

VICTORIA COPPER MINING COMPANY, Respondent, }
vs.
WILLIAM HAWS *et al.*, Appellants. }

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

Samuel R. Whitall, being duly sworn, on his oath states that he is acquainted with the premises in controversy in this action; that said premises were at the time judgment was rendered in this action in the district court, and also at the time the judgment of affirmance was rendered in the supreme court of Utah Territory, worth more than ten thousand dollars, in affiant's judgment.

(Signed) SAMUEL R. WHITALL.

Subscribed and sworn to before me this 1st day of October, A. D. 1891.

W. P. LYNN,

[SEAL.] *Notary Public for Salt Lake County, Utah.*

Endorsed: Title of court and cause. Affidavit of value of matter in dispute. Filed in supreme court Oct. 1st, 1891, at Salt Lake City, Utah. Joseph P. Bache, clerk.

165 VICTORIA COPPER MINING COMPANY, Respondent,
vs.
WILLIAM HAWS, HEBER TIMOTHY, EDWARD W. KEITH, FRANK A. Keith, Samuel R. Whitall, William V. R. Whitall, and Michael E. Smith, Defendants and Appellants.

Now come said defendants and appellants above named, by their attorney, and say that in the record and proceedings in the above-entitled matter there is manifest error, in this, to wit:

(1.) That the supreme court of Utah Territory erred in affirming the judgment of the trial court because said trial court erred in overruling appellants' objection to the introduction of Exhibits "C" and "D," which exhibits are as follows, to wit:

"EXHIBIT C.

"The undersigned hereby gives notice that he claims 1,500 by 600 feet of this the Copper the Ace lode, with all the dips, spurs, angles, and variations, situated in Carbonate mining district, Uintah county, Utah Territory; from this tree northeasterly 300 feet, thence southeasterly 1,500 feet, thence southwesterly 600 feet, thence northwesterly 1,500 feet, thence northeasterly 300 feet to the place of beginning.

"September 17th, 1887.

"LEWIS R. DYER.

"Recorded at the request of Lewis R. Dyer this 13th day of February, A. D. 1888, at 10 o'clock a. m., in Book I of Records, page 96.

"PHIL. STRINGHAM,
"*Recorder, Uintah County.*"

166 "EXHIBIT D."

"The undersigned hereby gives notice that he claims 1,500 by 600 feet of this the Antietam lode, with all the dips, spurs, angles, and variations, situated in Carbonate mining district, Uintah county, Utah Territory; from this tree northeasterly 300 feet, thence northwesterly 1,500 feet, thence southwesterly 600 feet, thence southeasterly 1,500 feet, thence northeasterly 300 feet to the place of beginning.

"September 17th, 1887.

"LEWIS R. DYER.

"Recorded at the request of Lewis R. Dyer this 13th day of February, 1888, at 9 o'clock a. m., in Book I of Records, page 95.

"PHIL. STRINGHAM,

"*Recorder, Uintah County.*"

The said exhibits being offered together and being papers filed by said Lewis R. Dyer in the office of the county recorder of said Uintah county.

(2.) The supreme court of Utah Territory erred in affirming said judgment because said trial court erred in admitting the two exhibits above referred to subject to appellants' objection thereto and failing finally to rule thereon.

(3.) The supreme court erred in affirming said judgment because the trial court erred in permitting the witness McLaughlin to testify that the defendant William Haws showed him the Harrison claims and in overruling appellants' objection thereto.

(4.) The supreme court erred in affirming said judgment because the trial court erred in permitting the witness McLaughlin to testify that the defendant Haws had shown him a stake which he claimed was a corner stake of the Copper the Ace claim and in overruling appellants' objection thereto, the evidence being expressly
167 offered against all the defendants and not simply against Haws.

(5.) The supreme court erred in affirming said judgment because the trial court erred in admitting said evidence of the witness McLaughlin subject to the objection and failing finally to rule thereon.

(6.) The supreme court erred in affirming said judgment because the trial court erred in permitting the witness William McLaughlin to answer the question, "Were you shown any stakes by Mr. Dyer?" in reply to which the witness stated that said Dyer had shown him some stakes claimed by Dyer to be stakes of the Copper the Ace and of the Antietam as located by him.

(7.) The supreme court erred in affirming said judgment because the trial court erred in permitting the witness William Donoher to answer the question, "Have you or the defendant Haws ever located any mining claims in that vicinity?" in reply to which said Donoher stated that Haws and himself had located claims in that vicinity, measuring from what they believed to be the discovery point of the Copper the Ace, and leaving a sufficient space between that discovery point and the claim so located by them to get off the Copper the Ace, this evidence being offered against all the defendants.

(8.) The supreme court erred in affirming said judgment because the trial court erred in permitting the witness Andrew Johnson to answer the question, "Prior to this time had Mr. Haws told you anything about his intending to take possession of the mine?" in reply to which said witness stated that Haws had told him about such intention while both Haws and himself were working
168 for the respondent herein.

(9.) The supreme court erred in affirming said judgment

because the trial court erred in permitting the witness Andrew Johnson to answer the question, "Now, what conversation did you have with him or he with you?" (meaning conversation had with Haws about Haws' intention to jump the mine), in reply to which the witness stated that Haws, while working for the respondent, informed him of his intention to jump the mine, alleging as a reason therefor that he never could find any of Dyer's stakes. This evidence was offered against all the defendants.

(10.) The supreme court erred in affirming said judgment because the trial court erred in permitting the witness Richard Pope to answer the question, "While he (meaning Haws) was in the employ of this company (meaning the Victoria Copper Mining Company) did he ever say anything to you as to his intending to jump the claim for relocation?" in reply to which the witness Pope stated that Haws while so working for the Victoria Copper Mining Company had informed him of his intention to jump the claim for relocation, this testimony being offered against all the defendants.

(11.) The supreme court erred in affirming said judgment because the trial court erred in permitting the witness E. A. Ferguson to answer the question, "How much money has the company (meaning the Victoria Copper Mining Company) expended in working the mine from its organization to the 10th or 11th day of June, 1889?" in reply to which the said Ferguson stated that it had expended between seven thousand and eight thousand dollars.

Wherefore the said appellants pray that the judgment of
169 the supreme court of Utah Territory be reversed, and that the said supreme court of Utah Territory be ordered to enter a judgment reversing the judgment of the trial court herein and ordering a new trial of this action.

(Signed) BENNETT, MARSHALL & BRADLEY,
Attorneys for said Appellants.

Endorsed: Title of court and cause. Assignment of errors and prayer for reversal. Filed in the supreme court Oct. 1st, 1891, at Salt Lake City, Utah. Joseph P. Bache, clerk.

170 In the Supreme Court of Utah Territory.

VICTORIA COPPER MINING COMPANY, Plaintiff and Respondent,
vs.
WILLIAM HAWS, HEBER TIMOTHY, EDWARD W. KEITH, FRANK A. Keith, Samuel R. Whitall, William V. R. Whitall, and Michael E. Smith, Defendants and Appellants.

This is to certify that on the trial of this cause in the trial court the following rulings of the court on the rejection and admission of evidence were made, all of which were excepted to by defendants and assigned by them as error on appeal to this court, to wit:

(1.) LEWIS R. DYER, a witness called for plaintiff, testified as follows, to wit: The two copies of location notices marked Exhibits C and D respectively were written shortly after the location—within a

month after the location; very likely two or three days. I went to Vernal in December, 1887; was down there again in January, 1888. When I went in December I did not have the notices with me; I left them in my cabin. When I went down in January I did have them with me. I have a memorandum of the location notices that I kept for my own use, and also some
171 memoranda jotted down on envelopes, but all these memoranda are at the mine and I have not them with me.

I would like to correct the testimony that I heretofore gave as to Exhibits C and D, as to when they were written. The copies I made in camp were on a figuring block. When I came to Salt Lake City I stopped at the White house, and there I copied them on paper about the 1st of February, 1888, in Salt Lake city, and mailed them to Blythe and Mitchell at Vernal, with a request that they should be recorded. I destroyed the original notices written on the figuring block after I made the copies in the White house, at Salt Lake City.

Plaintiff here offered in evidence recorded copies of the notices of location hereinafter set out and entitled Exhibits "C" and "D" respectively. These notices were offered in connection with the amended notices set forth in the findings.

Defendants objected to the introduction of said copies on the ground that it did not appear that they were filed in any mining recorder's office, and that there was no law requiring them to be filed in a county recorder's office, and that his certificate thereto was therefore no evidence of the contents of the original, and also because it appeared that the paper filed in the county recorder's office was itself a copy of a copy. The same objection was made as to each of said exhibits.

The COURT: I will receive it subject to the objection.

To which ruling of the court the defendants then and there duly excepted.

172 EXHIBIT C.

The undersigned hereby gives notice that he claims 1,500 by 600 feet of this the Copper the Ace lode, with all the dips, spurs, angles, and variations, situated in Carbonate mining district, Uintah county, Utah Territory; from this tree northeasterly 300 feet, thence southeasterly 1,500 feet, thence southwesterly 600 feet, thence northwesterly 1,500 feet, thence northeasterly 300 feet to the place of beginning.

September 17th, 1887.

LEWIS R. DYER.

Recorded at the request of Lewis R. Dyer this 13th day of February, A. D. 1888, at 10 o'clock a. m., in Book I of Records, page 96.

PHIL. STRINGHAM,
Recorder, Uintah County.

EXHIBIT D.

The undersigned hereby gives notice that he claims 1,500 by 600 feet of this the Antietam lode, with all the dips, spurs, angles, and variations, situated in Carbonate mining district, Uintah county, Utah Territory; from this tree northeasterly 300 feet, thence northwesterly 1,500 feet, thence southwesterly 600 feet, thence southeasterly 1,500 feet, thence northeasterly 300 feet, to the place of beginning.

September 17th, 1887.

LEWIS R. DYER.

Recorded at the request of Lewis R. Dyer this 13th day of February, A. D. 1888, at 9 o'clock a. m., in Book I of Records, page 95.

PHIL. STRINGHAM,
Recorder, Uintah County.

(2.) WILLIAM C. MCLAUGHLIN, a witness in behalf of plaintiff, testified:

I know a claim said to have been located by William Haws and Donoher. The claim was the Harrison claim.

Q. Did he, Haws, show you that claim?

Defendants object to the question as hearsay and immaterial, it appearing that at this time, namely, in June and July, 1888, Haws was not interested in the property to the title to which de-
173 fendants succeeded, and that at the present time he is not interested at all in the property, although nominally a defendant to the suit.

THE COURT: Oh, well, he may answer subject to the objection.

To which ruling of the court the defendants then and there duly excepted.

A. That is the Harrison. Well, we walked to the stake, and he said it was his corner stake.

The defendants asked to strike out the answer of the witness, and the motion was overruled by the court; to which the defendants duly excepted.

(Witness continuing:) He stated it was a corner stake of the Copper the Ace claim.

Defendants moved to strike out this on the same ground. Same ruling by the court. Exception by the defendants.

(Witness continuing:) That stake stood at the foot of the hill, as near as I can recollect.

(3.) WILLIAM C. MCLAUGHLIN, a witness in behalf of plaintiff, testified as follows:

Q. Were you shown any stakes by Mr. Dyer?

To this question defendants objected as a self-serving declaration on the part of an officer of the plaintiff; and defendants' counsel stated he objected to said question as calling for hearsay, and as being a self-serving declaration on the part of an officer of the company; that what he objected to was not that the witness saw stakes, but that Dyer had shown them.

Objection overruled by the court; to which ruling the defendants then and there duly excepted.

174 A. He showed me one stake, and that was located where we loaded ore, and is about the place marked corner 1, common stake of the Antietam and the Copper the Ace. That is the only stake he showed me. At the time I was not working at the mine; I was hauling for the company.

(4.) WILLIAM DONOHER, a witness in behalf of the plaintiff, testified as follows:

Q. Did he, Haws, ever locate any mining claims in that vicinity?

Defendants objected to this as immaterial, so far as the defendants were concerned.

Counsel for plaintiff then stated that he wished to show that Haws had, prior to his relocation of the plaintiff's claims, located claims adjoining those claims and in that way recognized their existence.

The court overruled defendants' objection; to which ruling of the court the defendants then and there duly excepted.

A. Yes, sir; he located one claim, called the Harrison; it joins on the east end of the Copper the Ace. At the time of locating that claim we measured from what we supposed was the discovery point of the Copper the Ace 1,500 feet.

(5.) ANDREW JOHNSON, a witness sworn in behalf of plaintiff, testified as follows:

I worked for the plaintiff at its mining claims in Uintah county. I went to work about the 28th of May, 1889, and worked for the plaintiff until the 2d day of July, 1889. I was working on the lower Dyer tunnel when Haws stopped us Monday morning,
175 when we started to work as usual. Defendant William Haws was on the dump with three men; George Timothy and Frank Hauser were with him. We got there about 7 o'clock. I had been working in the same tunnel the Saturday previous. We didn't work on Sunday. When we came up Monday, Donoher went to Haws and asked him if he meant to jump the mine, and if he would not let us go in to work, and Haws said he had jumped the mine and would not allow us to work. Nothing more was said, except Donoher said, If we can't work, boys, let us go and work on the road. Haws had told us he was going to take possession. The Sunday night previous, about a mile from the claims, he asked Donoher if he would quit work. Donoher said he would not. Haws said that he would see that he would quit work, as he had to have possession of the mine.

Q. Prior to this time had Haws told you anything about his intending to take possession of the mine?

Defendants object to the question as calling for hearsay and immaterial evidence as to the other defendants, and that Haws was not now interested in the controversy.

Objection overruled; to which ruling of the court the defendants then and there duly excepted.

A. Yes, sir; when we worked together in the shaft in the further winze of the main or big tunnel.

(6.) Same witness further testified in respect to the same matter:

Q. Now, what conversation did you have with him or he with you?

Defendants objected, that it was immaterial and hearsay.
176 The court overruled the objection; to which ruling of the court the defendants then and there duly excepted.

A. Well, one day Haws said to me, Johnson, if you don't tell anybody I will tell you something I have been calculating to do for some time. Well, I said, I guess it is none of my business. He said, I am going to jump this mine. I says, Why, Bill, how can you do it? or, I would not do it, or something like that, and he says, Yes; I am going to get even with the old man. Well, I says, I don't see how you can do it. He says, I can do it, because Mr. Dyer has no corners—no stakes that I know of. This conversation was shortly before he took possession. I can't tell how long, but it was while Haws was working for the company.

(7.) RICHARD POPE, a witness in behalf of the plaintiff, testified as follows:

Q. While he, Haws, was in the employ of this company, did he say anything to you as to his intending to jump the claim for relocation?

Defendants objected to the question as calling for immaterial and irrelevant testimony, and as hearsay as to the other defendants, because it appears that Haws is not interested in the claim and was not at the time of the conversation referred to.

The COURT: It may be received subject to the objection.

Exception by defendants.

A. Yes, sir; to the best of my recollection, the conver-
177 sation was only a short time before Haws took possession. We were walking over the ground when the conversation took place.

(8.) EDWARD A. FERGUSON, a witness in behalf of plaintiff, testified as follows:

Q. How much money has the company expended in working

the mine—from its organization to the 10th or 11th of June, 1889?

Defendants objected to this question as immaterial and irrelevant, and, if it was for the purpose of showing assessment work, that it was not a question of what they had expended, but the value of the work done.

Mr. DEY: I am offering it to show the good faith in working the property by the plaintiff company.

Mr. MARSHALL: There is no issue here, I take it, as to good faith.

The court overruled defendants' objection; to which ruling of the court the defendants then and there duly excepted.

The court stated that it would be evidence tending to show the actual value of the improvements and subject to cross-examination.

Witness, continuing, testified that the company had expended about seven thousand dollars.

(9.) AUGUST BOHM, a witness in behalf of plaintiff, testified as follows:

178 I am the secretary of the plaintiff company and have been such since its organization. I reside in Chicago. I am somewhat of a photographer. I have been taking photographs for pleasure since I got my first camera, in 1880, in Boston. I have taken pictures off and on since then for my own pleasure and amusement. I was on the ground in controversy in the latter part of September, 1888. I was also there the first part of October of the same year. While there I took some photographs with a camera. The photographs handed me I identify as being the photographs I took. The photographs are photographs of the ground in controversy.

Plaintiff then offered in evidence the photographs so taken and stated that they were offered to show both the nature of the country as to the wood, fallen timber, and the like, and that there was no tree lying across the mouth of the open cut at the time when these photographs were taken.

Defendants objected to the introduction of these photographs on the ground that they were immaterial and irrelevant and not proper evidence.

The objection was overruled by the court; to which ruling the defendants took exception.

The photographs were admitted in evidence and purported to show the ground in controversy.

JOHN W. BLACKBURN, *Judge.*

[Seal Supreme Court, Territory of Utah, United States of America.]

Attest: JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

The above statement embraces part of the testimony of the witnesses named, but not all, nor does it contain the testimony of other witnesses sworn in the case, but is correct so far as it goes, except showing the corrections and explanations appearing.

October 12th, 1891.

JAMES A. MINER, *Judge.*
C. S. ZANE, *C. J.*

179 [Endorsed:] Supreme court of Utah. File No. 186. Victoria Copper Mining Company, respondents, *vs.* William Haws *et al.*, appellants. Certificate of trial, objections, etc. Filed in the supreme court Oct. 15, 1891, at Salt Lake City, Utah. Jos. P. Bache, clerk.

180 UNITED STATES OF AMERICA:

TERRITORY OF UTAH, } *ss:*
County of Salt Lake, }

I, Joseph P. Bache, clerk of the supreme court in and for the Territory of Utah, in pursuance of an appeal allowed in the case of The Victoria Copper Mining Company, a corporation, as respondent, and William Haws *et als.*, as appellants, lately pending in said court, do return attached hereto a transcript of the record and proceedings, opinion, bond, affidavit of value of matter in dispute, together with the original citation, and certificate of trial, objections, and exceptions, all in and of said court and cause, to the Supreme Court of the United States; and I hereby certify that said attached transcript of said record and proceedings, opinion, bond, and affidavit is a full, true, and correct copy of the several originals thereof on file or of record in my office.

In witness whereof I hereunto set my hand and affix the seal of the supreme court of Utah Territory this sixteenth day of October, A. D. 1891.

[Seal Supreme Court, Territory of Utah, United States of America.]

JOSEPH P. BACHE,
Clerk Supreme Court, Utah Territory.

Endorsed on cover: Case No. 14,919. Utah Territory supreme court. Term No., 1445. William Haws, Heber Timothy, Edward W. Keith, *et al.*, appellants, *vs.* The Victoria Copper Mining Company. Filed October 31, 1891.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1891.

WILLIAM HAWS, HEBER TIMOTHY, EDWARD W. KEITH ET AL., *Appellants*,

vs.

THE VICTORIA COPPER MINING COMPANY.

Record Case No. 14919.

Term No. 1445.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

[Filed October 31, 1891.]

Brief for Appellee on Motion to Dismiss or Affirm.

C. H. ARMES,
Attorney for Appellee.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1891.

WILLIAM HAWS, HEBER TIMOTHY, EDWARD W. KEITH ET AL., *Appellants*,

vs.

THE VICTORIA COPPER MINING COMPANY.

Record Case No. 14919.

Term No. 1445.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

[Filed October 31, 1891.]

Brief for Appellee on Motion to Dismiss or Affirm.

Now comes the appellee in the above-entitled cause and moves the court—

First, to dismiss the appeal for want of jurisdiction, because it does not appear in the record that the value of the property in dispute exceeds $5,000.

Second. Said appellee further moves the court to affirm the judgment of the court below, because there is no question presented by the record which this court will review, and it is obvious that the appeal was taken for delay only.

C. H. ARMES,
Attorney for Appellee.

To JOHN A. MARSHALL, Esq.,
Attorney for Appellants,
Salt Lake City, Utah Territory.

Take notice that on Monday, January 18, 1892, or as soon thereafter as the court will entertain the same, the above motion will be called up and submitted to the Supreme Court of the United States.

C. H. ARMES,
Attorney for Appellee.

Statement of the Case.

This is an appeal from the decision of the Supreme Court of the Territory of Utah, affirming the judgment of the First Judicial District Court of that Territory. The action was to recover possession of two certain mining claims and damages for removing ore, and for an injunction from further molestation. Judgment was for the plaintiff below, and the defendant appealed to the Supreme Court of said Territory, and from the decision of that Court appealed the case here.

The record shows that on the 8th of October, 1890, the appellee filed its complaint in said district court, and that the defendant thereafter filed an answer denying the allegations of the complaint, and setting up by way of a cross petition counter claims to the property. That the original complainant replied to said cross complaint (Pr. Rec., pp. 1 to 10), and that the case was tried by the judge, the parties having waived a trial by jury (Pr. Rec., p. 11).

That said judge thereupon made and filed specific findings of fact and conclusions of law, nine of which findings of fact fully sustain the conclusions of law, and are substantially as follows (Pr. Rec., p. 11):

1. That one Dyer, the locator of said mining claims, at and prior to the time of locating the same, discovered and appropriated a mineral vein or lode of rock in place.

2. That at the time of said discovery and location the land included within the boundaries of said claims was public mineral land, wholly unoccupied and unclaimed.

3. That after the said discovery, to wit, on the 17th September, 1887, said Dyer, being a citizen of the United States, located said claims by writing on a certain tree a notice of location for each claim.

4. That said notices each described the respective claims by reference to said tree, and described the boundaries thereof by courses and distances from said tree; that each of said notices contained the name of the locator and date of the location, and that said tree was a sufficient natural object by which said claims and each of them could be identified.

5. That soon after the writing of said notices of location and during the month of September, 1887, *said Dyer marked sufficiently on the ground the boundaries of said mining claims by suitable stakes* and otherwise.

6. That thereafter, on 13th of February, 1888, said Dyer caused copies of said location notices to be recorded in the office of the county recorder; that *there was not at that time or at the time of locating said claims any mining district* recorder; that said mining claims were situated in what had been known as the "Carbonate mining district," that *the rules and regulations of said mining district had long prior to said 17th day of September, 1887, fallen into disuse and were not then and for a long time prior thereto had not been in force and effect.*

7. That plaintiff is a corporation duly organized, etc.

8. That said claims had been transferred by certain mesne conveyances from said Dyer to the plaintiff.

9. That since said 17th day of September, 1887, and until 10th June, 1889, said Dyer and his said grantees, the plaintiff herein, continuously worked upon and improved each of said mining claims and actually possessed the same and expended in said work and improvements more than

$7,000; that said claims were contiguous and were worked jointly with each other; that said work and improvements did develop said claims, and that for each year more than $100 worth of work was actually done on each claim by said Dyer and his said grantees.

As conclusions of law the judge found, substantially, that said claims are valid mining claims and that the plaintiff is entitled to the possession thereof subject only to the paramount title of the United States; that defendants have no title or interest therein and that the plaintiff is entitled to judgment for possession of the premises and damages which are assessed at $1,047.57 with costs, and that the defendants are enjoined from extracting or removing ore therefrom, and judgment was rendered accordingly. (Pr. Rec., p. 15.)

On the 13th day of February, 1891, the defendants filed in the aforesaid court a certain document styled "Statement on Motion for New Trial" (Pr. Rec., p. 67). Said statement contains several affidavits and exhibits certain testimony of witnesses at the trial, exceptions of appellant to certain rulings of the court as to the admissibility of evidence, together with certain specifications and particulars in which the evidence was alleged by the defendant's counsel to be insufficient to support the findings of the judge, also an assignment of alleged errors of law occurring at the trial excepted to by the appellants. On page 66 of the printed record is a certificate of the presiding judge of said District court bearing date the said 13th day of February, 1891; that said statement was then settled and allowed as and for appellant's *statement on motion for a new trial of this action.* Thereupon, on said 13th day of February, 1891, it was ordered and adjudged by said court that said motion for a new trial be overruled (Pr. Rec., p. 67), and defendants appealed to the Supreme Court of

the Territory of Utah (Pr. Rec., p. 67). On the 13th of June, 1891, said cause was submitted to said Supreme Court of the Territory of Utah, and thereafter, on the 12th day of September, 1891, the aforesaid judgment of the District court was affirmed with costs (Pr. Rec., p. 70); whereupon the appellants took an appeal to the Supreme Court of the United States (Pr. Rec., p. 73). Thereafter, to wit, on the 1st day of October, 1891, an affidavit was made by one Samuel R. Whitall in the following language: "Samuel R. Whitall being duly sworn on his oath states that he is acquainted with the premises in controversy in this action; that said premises were at the time judgment was rendered in this action in the District court, and also at the time the judgment of affirmance was rendered in the Supreme Court of Utah Territory, worth more than $10,000 in affiant's judgment" (Pr. Rec., p. 75). Said affidavit was filed in said Supreme Court on said 1st day of October, 1891 (Pr. Rec., p. 76). Appellant also on said 1st day of October, filed in said cause eleven assignments of alleged error and prayed a reversal of the judgment of the Supreme Court of said Territory (Pr. Rec., pp. 76 to 78) and thereafter, on the 12th day of October, filed a statement of the rulings of the trial court on the rejection and admission of evidence which were excepted to and assigned as error on appeal to the Supreme Court of the Territory (Pr. Rec., pp. 78 to 83), said statement bearing the following indorsement: "The above statement embraces part of the testimony of the witnesses named, but not all, nor does it contain the testimony of other witnesses sworn in the case but is correct so far as it goes, except showing the corrections and explanations appearing.

"October 12, 1891. JAMES A. MINER, *Judge.*
C. S. ZANE, *C. J.*"
(Pr. Rec., p. 84).

Argument.

First. The record does not show the value of the property involved. Appellants have submitted their case to this court, so far as value is concerned, upon the affidavit of one Samuel R. Whitall. The property is mining land of small surface area, and if it is worth $5,000 or more it is because of its mineral character. The affiant does not show that he has any knowledge of mines or minerals, or that he is in any way qualified to express an opinion as to the value of mineral property. Nor does it appear that he is the Samuel R. Whitall who is a party to this action. It is therefore respectfully submitted that there is nothing before the court either in the record or in the affidavit showing that the value of the property involved is over $5,000; nor is there any Federal question raised.

Second. If, however, the court is of opinion that the said affidavit sufficiently shows value, then it is further respectfully submitted that there is color of right to a dismissal in the fact that such value does not appear *upon the face of the record*, and that the case comes within the rule for affirmance of the judgment.

An examination of the entire record and transcript shows that the first nine of the findings of fact (which are particularly above mentioned) completely establish the appellee's right to the judgment rendered, and some of the facts therein are not necessary to the conclusions of law. There are ten other findings of fact, but they do not state any fact which is not included in the above nine that is necessary or material to the conclusions of law found. Examination of the several findings first above mentioned and of the several specifications of alleged error shows that in no instance do the alleged errors apply to any matter necessary to support any material fact in either of these nine findings. None of them go to the testimony showing the fact of location, marking off and working the mines

or any act of compliance with the law by the appellee, but all go to *other and immaterial matter.* If Exhibits "C" and "D" had not been offered in evidence, and if the questions objected to had not been answered or asked, the case would be quite as strong, and support for the findings would be found if wanted, in competent evidence not objected to.

This court has said that the findings of fact by the court below are conclusive and cannot be re-examined by this court.

Zeckendorf *vs.* Johnson, 123 U. S., 617.
Eilers *vs.* Boatman, 111 U. S., 356.

And it is respectfully submitted that there is no question of law raised upon this record which the appellants have a right to ask this court to examine. The questions all relate to matter not necessary or material to the judgment.

The 1st, 2d, 3d, 4th, 5th, 7th, 8th, and 9th findings of fact show most complete locations of the two claims and show also a continued compliance with the law requiring annual work. These findings are supported by only competent evidence not objected to. The facts therein found are fully shown by the testimony of Lewis R. Dyer, *all of which is without objection.* (Pr. Rec., 25 to 30.)

The first and second specifications of error relate to the introduction of Exhibits C and D, being copies of the location notices.

The law nowhere requires the recording of a location notice, and in this case *there were no local regulations in force in this mining district at the time of Dyer's location, nor was there a recorder's office in that mining district.* (Finding 6, Pr. Rec., 12.)

Fuller *vs.* Harris, 29 F. R., 814–18.
Jupiter Mg. Co. *vs.* Bodie Co., 11 *Id.*, 66.
Mg. Co. *vs.* Orient, 1 *Id.*, 522.
Rev. Stat. U. S., Secs. 2322 and 2324.

Such a notice is only one of the *customary acts* showing an appropriation or intention to appropriate. It could well have been dispensed with in this case for the ninth finding of fact (Pr. Rec., 12), to which no objection was made, shows actual possession and work continuously from the time of location to the time appellee was ousted forcibly by Haws. So that the appropriation was by "continuously working" and "actually possessing the same," and the notice (as in this case when there are no local regulations requiring it) was unnecessary and ceases to be of any importance. But, *as an act of location*, Dyer testified to writing notices on a tree (Pr. Rec., 25) and Exhibits C and D could not affect that proof. Shaw also testified that he saw the notices on the tree. (Pr. Rec., 30.)

The third and fourth findings of fact (Pr. Rec., 12) show that notices of the claims were written on a tree. No objection was made to either of these two findings *in respect to the evidence as to the contents of the notices*, the objections being solely that (1) Dyer never wrote any notices on the tree; (2) that there was no tree.

These two objections arise out of conflicting testimony, but as to the contents of the notices, if notices were written, no objection was made. The testimony as to the contents or sufficiency of said notices stands undisputed.

But the admission of the notices was clearly right. The originals had been destroyed and the Exhibits C and D were copies of the notices written on the tree.

The 3d, 4th, 5th, 6th, and 7th specifications of error are wholly unimportant and immaterial. Questions in relation to the Harrison claim or other locations or the showing of stakes are of no pertinence to the facts found. They tended simply to develop the fact that the appellant Haws knew the boundaries of appellee's claims, and that fact does not appear to have influenced or entered into the findings. These alleged errors are unimportant, as the testimony of Dyer not objected to shows that he marked the boundaries, *and that being a fact* the location of the

Harrison stakes or claims or pointing them out could not affect it.

Specifications 8, 9, and 10 of alleged error become equally unimportant, as the testimony concerning Haws' intent to "jump" the mine does not tend to uphold nor to discredit the findings of fact first above referred to, which *completely cover the case.* Moreover, Haws was an employee of the appellee's up to within a few days of his taking forcible possession, and this evidence was competent as tending to show a fraudulent intent on his part. It is not, however, relevant to the marking of the boundaries, and the marking having been finally settled as a fact this testimony becomes unimportant. It could not prejudice the appellants in this aspect of the case.

The 11th specification of alleged error is likewise immaterial and could not prejudice the rights of the appellants, because the appellants admitted that the appellee "had caused .to be done and performed during the years 1888 and 1889, more than $100 worth of work on each claim" (Pr. Rec., p. 42), and the ninth finding of fact was not excepted to, and there was other evidence showing the amount expended in work on the claims.

The admission of immaterial and irrelevant evidence which it is manifest could not have injuriously affected the case of the plaintiff in error does not entitle him to a reversal of the judgment.

Mining Co. *vs.* Taylor, 100 U. S., 37.
New York, &c., RR. Co. *vs.* Madison, 123 U. S., 524.

It is submitted that the findings of fact referred to fully justify the conclusions of law, and that by Chapter 80, Act of Congress of April 7, 1874, 18 Stat., 27, this court is required to accept the findings of fact, on appeal from the Supreme Court of said Territory, as true.

Stringfellow *vs.* Cain, 99 U. S., 610.
Hecht *vs.* Boughton, 105 U. S., 235.
Eilers *vs.* Boatman, 111 U. S., 356.

Third. Aside from the findings of fact by the judge below this record contains no statement of the testimony before the court, properly certified, from which this court can judge of the character of the evidence put in prior to the offers of the evidence objected to, and nothing from which the court can determine the propriety of the questions asked the witnesses; and for that reason also the appellants have no right to a review of said rulings in this court.

A statement showing the questions objected to is certified by Miner, J., and Zane, C. J., in the Supreme Court, but there is no certificate as to the testimony by the justice (Anderson) who presided at the trial excepting those specifically objected to. (Pr. Rec., pp. 78 to 84).

Sire *vs.* Ellithorpe Air Brake Co., 137 U. S., 579.

Act of April 7, 1874, R. S. U. S., Sup., 7.

As the facts necessary to sustain the judge are not affected by the alleged errors in admitting evidence, it leaves this appeal without an apparent show of good faith; and it is respectfully submitted that the appeal should be summarily disposed of with damages.

Sire *vs.* Ellithorpe Air Brake Co., 137 U. S., 579.

C. H. Armes,
Attorney for Appellee.

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IN THE

Supreme Court of the United States.

WILLIAM HAWS, HEBER TIMOTHY, EDWARD W. KEITH ET AL., *Appellants,*

vs.

THE VICTORIA COPPER MINING COMPANY, *Appellee.*

Record Case No. 14919.

Term No. 1445.

Brief for Appellant on Motion to Dismiss or Affirm.

JOHN A. MARSHALL,
Attorney for Appellants.

Star Printing Co., Herald Block.

IN THE

Supreme Court of the United States.

WILLIAM HAWS, HEBER TIMOTHY, EDWARD W. KEITH ET AL., *Appellants*,

vs.

THE VICTORIA COPPER MINING COMPANY, *Appellee*.

Record Case No. 14919.

Term No. 1445.

Brief for Appellant on Motion to Dismiss or Affirm.

The record shows that some of the appellants filed in this action a cross-complaint seeking to quiet their title to the premises in controversy against the appellee. This cross-complaint was answered and the whole controversy was tried at the same time.

The sixteenth finding of fact is to the effect that prior to the institution of the suit, appellant Haws had conveyed to the other appellants all of his interest in the demanded premises. (Record p. 14.)

The twelfth finding of fact shows that the initiation of Haws' title, if he had any, and claim to the demanded premises was on June 7th, 1889.

The ninth finding is to the effect that appellee had, prior to the commencement of the suit, expended in work and improvements on said premises more than $7,000. (Record p. 12.)

And the nineteenth finding is to the effect that in one month and six days prior to the filing of the complaint, appellants extracted from the demanded premises, ore of the value of $1897.57.

It also affirmatively appears that counsel for appellee was present when the appeal was allowed; that he made no objection to such allowance and that the court fixed a supersedars bond of $10,000 as a condition of such appeal. (Record p. 70.)

There appears in the record appellants' statement used on a motion for a new trial in the trial court and settled as such by the judge who tried the case. (Record p. 66.)

There also appears a statement of "the rulings of the trial court on the admission or rejection of evidence." This is signed without qualification by John W. Blackburn, Associate Justice of the Supreme Court of Utah Territory, who wrote the opinion, affirming the judgment of the trial court and also signed, with the qualifications stated by the other two judges who constituted the Supreme Court of Utah Territory on this appeal.

The mining claims in question were all located after the mining act of May 10th, 1872, and the controversy turned on the question whether or not Lewis R. Dyer, the predecessor in title of appellee, made any valid location of the mining ground claimed by appellee. It being contended by appellants that he failed to stake the claims or in any way mark them on the ground so that their boundaries could be traced and also that he failed to post on the ground any notice in any way describing the claims.

The trial court found against appellants on these points and it is contended by appellants that this finding, against the great weight of the evidence, was induced by evidence erroneously admitted against their objection and to the admission of which they duly saved exceptions.

ARGUMENT.

I.

The only reason advanced for the motion to dismiss is that it does not appear that the value of the matter in dispute exceeds $5,000.

The court found that appellee had expended on the property a sum exceeding $7,000.

It found that appellants had extracted therefrom ore of the value of $1897.57 in the short space of thirty-seven days.

It required appellants to give a supersedeas bond of $10,000 on this appeal.

There is in the record an affidavit of Samuel R.

Whitall, presumably—because of the same name—one of the appellants who had been working this property, that in his judgment the premises in controversy are and were at the date of the judgment appealed from worth more than $10,000.

And there is no counter showing whatsoever. If there was even room for a difference of opinion as to the value of the property, is it not fair to presume that appellee, in support of its motion to dismiss, would produce some affidavit raising an issue of fact on that point? In the absence of such showing it is submitted that there does not appear on the record any color of right to a dismissal and that the motion to affirm should not be considered.

Whitney vs. Cook, 91 U. S. 607.

May vs. Sloan, 101 U. S. 232.

Harris vs. Barber, 129 U. S. 366.

II.

On the motion to affirm it is argued:

1st.—That appellant's exceptions are not presented in such a manner as would permit this court to consider them

2d.—That the rulings complained of, if error, did not prejudice appellants.

under the first subdivision it is said that the statement used on motion for a new trial cannot be used on an appeal from the judgment.

This would be true in the absence of a stipulation that it should be so used.

Montana Railway Co. vs. Warren, 137 U. S. 348.

Or in the absence of a statute making it *ipso facto* a record on appeal from the judgment.

In Utah Territory there is such a statute.

Section 3646, Vol. 2, Comp. Laws of Utah Territory provides that "any statement used on motion for a new trial, or settled after decision of such motion, when the motion is made upon the minutes of the court, as provided in Section 538, or any bill of exceptions settled, as provided in Section 525 or 526, is used on motion for a new trial, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing the new trial." (Only the material portion of the section is quoted.)

This statement of the case settled by the trial court and used on the motion for a new trial of the action, was used in the Supreme Court of Utah Territory on the appeal from the judgment as well as on the appeal from the order denying a new trial and is now before this court on this appeal.

Counsel for appellee has commented on an additional statement of the rulings of the trial court on the admission or rejection of evidence, certified by the Supreme Court of Utah Territory. This has been done under Section 698 Revised Statutes of U. S.; the portion of that section pertinent here being as follows:

"*Provided*, That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below and transmitted to the supreme court together with the transcript of the proceedings and judgment or decree; * * *"

It is probably true that the additional statement is surplusage; that the original statement settled by the trial judge and presenting more at large the errors assigned, being certified to this court, is sufficient; but

the additional statement, it is submitted, when taken in connection with the findings, sufficiently presents the rulings complained of.

2.—Are not the rulings assigned as error such as must have prejudiced appellants?

The issue being as to the marking of appellee's claims on the ground Lewis R. Dyer testified to such marking, and three other witnesses to a slight extent corroborated him. On the side of appellants there were more than six witnesses who testified that there was no such marking. But to corroborate Dyer the trial court admitted evidence, expressly against all of the appellants, and not as impeaching testimony;

(*a*)—That Haws, prior to owning appellants' claims, prior to their location even, had made certain admissions tending to show the proper location of appellees' claims. (See Assignments of error 3, 4, 5, Record p. 77; and for the testimony objected to see Record pp. 33, 36.)

(*b*)—That Lewis R. Dyer had pointed out to McLaughlin, a witness for appellee, a certain stake. (See Record p. 35 for testimony.)

(*c*)—That Haws prior to making appellants' locations, had conversed with witnesses stating his intention to make such locations and his reasons therefore. (Record p. 40.)

All of this evidence was admitted as admissions of one under who appellants' claim.

(*d*)—Two claimed copies of location notices, written several months after the locations and introduced in evidence for the purpose of showing the extent and description of appellee's claims. (See Record pp. 66, 29).

For an appellate court to disregard errors committed by the trial court in the admission of evidence it must clearly appear that the errors complained of could not have prejudiced the rights of the party against whom the rulings were made.

It is respectfully submitted that the case should not be summarily disposed of but that opportunity should be afforded appellants to properly present it.

JOHN A. MARSHALL,
Attorney for Appellants.

CASE NO. 11919.

Term No. 66.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

WILLIAM HAWS, HERBERT TIMOTHY EDWARDS W. KEITH *et al.*, *Appellants.*

vs.

THE VICTORIA COPPER MINING COMPANY, *Appellee.*

Appeal from the Supreme Court of the Territory of Utah.

APPELLANTS' BRIEF.

CHARLES H. TOLL,
D. V. BURNS,
Attorneys for Appellants.

CLARK & REID, PRINTERS, 1535 LAWRENCE ST., DENVER.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

WILLIAM HAWS, HEBER TIMOTHY, EDWARD W. KEITH *et al.*, *Appellants,*

vs.

THE VICTORIA COPPER MINING COMPANY, *Appellee.*

Appeal from the Supreme Court of the Territory of Utah.

APPELLANTS' BRIEF.

Statement.

This suit was commenced by The Victoria Copper Mining Company against William Haws, Heber Timothy, Edward W. Keith, Frank A. Keith, Samuel R. Whitall, William V. R. Whitall and Michael E. Smith, by filing in the District Court of the First Judicial District of the Territory of Utah a complaint in which it was in substance, alleged that one Lewis R. Dyer, on the 17th day of September, 1887, located two certain mining claims upon the unoccupied domain of the United States, in the County of Uintah, Territory of Utah.

That afterwards, on the same day, said Dyer duly marked the boundaries of said mining claims and locations, and each of them, and duly posted notices thereof on said locations and each of them, at the respective

places of discovery; which said notices were thereafter duly recorded in the office of the County Recorder in and for said County of Uintah.

That the plaintiff has been the owner of said mining claims since the 25th day of May, 1888. That it and its grantor had been in the continuous and undisturbed possession of the said claims from the time the same were so located until on or about the 10th day of June, 1889, when the defendants William Haws and Heber Timothy wrongfully and unlawfully entered upon the same and ousted the plaintiff therefrom.

That the said claims were originally named, respectively, "Antietam Lode," and "Copper the Ace Lode."

That thereafter, and on or about the 12th day of September, 1889, said Timothy, at the request of said Haws, made a pretended location of what he called the Valao mine; that said pretended location embraces substantially the same ground covered and included by said Antietam Lode; also, on that on said last mentioned date said Timothy made another pretended mining location and called it "Copper King"; that said pretended location, so made, embraces substantially the same ground covered by said Copper the Ace mining claim.

That these two said defendants named their mines "Scottish Chief" and "Ontario Mine," respectively.

That on or about the 9th day of August, 1890, defendant Haws, by an instrument in writing under his hand and seal, pretended to convey to said Heber Timothy the so-called Scottish Chief and Ontario Lode mining claims; that thereupon and upon the same day said Heber Timothy, by an instrument in writing under his hand and seal, pretended to convey to defendant Michael E. Smith the so-called Scottish Chief and Ontario mining claims.

That thereafter, and in pursuance of said preconceived design of wrongfully keeping plaintiff from the possession of its aforesaid mining claims, and on the 11th day of August, 1890, said Michael E. Smith, by an instrument in writing under his hand and seal, attempted and pretended to convey to defendants, Samuel R. Whitall, William V. R. Whitall, Edward Keith and Frank A. Keith, in consideration of the sum of $1, an undivided one-half interest in the so-called Valao and Copper King mining claims.

Prayer for possession and damages.

Printed record, pp. 1–4.

The defendants, by specific denials, put in issue the material averments of the complaint.

Printed record, pp. 5–8.

By way of cross-complaint the defendants, Edward R. Keith, Samuel R. Whitall, William V. R. Whitall and Michael E. Smith, alleged that they were the owners and in possession and entitled to the possession of the Valao and Copper King mining claims, which it will be seen from the map on page 66 of the record differed but slightly in their boundaries from the boundaries of the claims sued for by plaintiff.

Prayer for quieting their title thereto, etc.

Printed record, p. 8.

The allegations of the cross-complaint were put in issue by specific denials.

Printed record, pp. 9 and 10.

The case was tried by the Court without a jury.

The findings of the Court, nineteen in number, sustained generally the contention of plaintiff.

Printed record, pp. 11–15.

A judgment was rendered in favor of the plaintiff, couched in the following language:

"Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed that The Victoria Copper Mining Company, the plaintiff herein, recover from the defendants, William Haws, Heber Timothy, Edward W. Keith, Frank H. Keith, Samuel R. Whitall, William V. R. Whitall and Michael E. Smith, the possession of the Antietam lode and Copper the Ace mining claims, situate in the Carbonate mining district, in the County of Uintah, Territory of Utah, and the premises embraced therein, and each and every part thereof, the same being specifically described in the complaint of the complainant herein, and confirming the title to said plaintiff in and to the same.

"It is further ordered, adjudged and decreed, that the said defendants have no right, title or interest in said mining claims and premises or any part thereof, or in the ore extracted therefrom; also, that said plaintiff do have and recover from the defendants the sum of $1,047.57, damages for ore taken from said mining claims and disposed of, together with the costs of this action, amounting to the sum of $649.60, making a total of $1,692.17.

"It is further ordered, adjudged and decreed that the said defendants and each of them, their servants, agents and employes, and everyone acting under them or any of them, are hereby enjoined and restrained from extracting or removing ore therefrom.

"Dated November 24, 1890.

(Signed,) "T. J. ANDERSON,
"*Judge.*"

Printed record, p. 16.

A motion for a new trial was made, supported by the affidavits of Charles W. Bocker, Thomas F. Thomas, Henry Cunnington, E. W. Keith, Frank Keith, Michael E. Smith and John Connors.

Printed record, pp. 17–24.

Bocker deposed and said: That after the rendition of the judgment he overheard a conversation between Lewis R. Dyer and Thomas F. Thomas, in which the former said: "That the fact was that he never set any stakes for the claims now claimed by The Victoria Copper Mining Company. He said, 'I did not have the time and didn't think anybody would interfere with me,' and said that William Rankin did not assist him in setting any stakes for said claims, nor were any stakes set."

Thomas F. Thomas deposed and said: "That on November 26, 1890 (which was two days after the rendition of the judgment herein), at the request of Charles W. Bocker, he asked said Dyer the facts as to the locations claimed by The Victoria Copper Mining Company * * * and that said Dyer told him that he would tell him the truth about the matter if he would promise to say nothing about it; that Dyer said that the truth was that he did not set any stakes in locating said claims; that he didn't have time and didn't think anybody would interfere with him, and that William Rankin did not assist him to set any stakes; that it didn't make any difference whether he set any stakes or not, he expected to make a good deal of money out of the fight."

Dyer was the alleged locator of the plaintiff's claims, and on the trial testified that he marked the boundaries thereof by setting stakes; that one William Rankin was present when he staked off the claims the most of the time, and helped him to make the measurements hrough the center line.

Henry Cunnington deposed and said: "That on or about December 1, 1890, in Salt Lake, Utah, he had a conversation with said Dyer relative to the decision of the District Court of Utah Territory, in the case of The Victoria Copper Mining Company vs. William Haws *et al.*, in which said Dyer boasted of having deceived the Court, and said that although the Antietam and Copper the Ace claims were not, in fact, staked; that he —Dyer—was no fool and that he had gotten the ground, anyhow, and made the Court believe that they had been staked."

None of these several sworn statements were cumulative, for they all relate to statements made by Lewis R. Dyer, "the Vice-President and general manager of the plaintiff corporation" (see printed record, page 26), after the trial of the case in the District Court.

The several deponents testified that they had no interest in the case. No counter-affidavits were filed, not even one made by Dyer himself.

The motion for a new trial was overruled February 13, 1891.

Printed record, p. 67.

An appeal was taken by the appellants to the Supreme Court of the Territory, which on the 12th day of September, 1891, affirmed the judgment of the District Court.

Printed record, pp. 70—72.

Section 3646, Vol. II., Comp. Laws, Utah, provides that "* * * Any statement used on motion for new trial, or settled after decision of such motion, when the motion is made upon the minutes of the Court, as provided in Section 538, or any bill of exceptions settled as provided in Sections 525 or 526, is used on motion for a new trial, may be used on appeal from a final judgment

equally as upon appeal from the order granting or refusing the new trial. * * *"

It is provided by an Act of Congress of April 7 1874, 18 Stats., 27, Section 2, "That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the Court on the admission or rejection of evidence when excepted to, shall be made and certified by the Court below and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree."

This section of the statute was construed by this Court in the case of *Idaho and Oregon Land Company vs. Bradbury*, 132 U. S., 509, 514, and again in *San Pedro, etc., Company vs. United States*, 146 U. S., 120, 130, and was in all respects complied with in the Courts below. A certificate was first made by the trial Judge, printed record, page 66, certified by counsel for both parties to be correct, printed record, page 70, and was thereafter again certified by the Justices of the Supreme Court.

Printed record, p. 84.

Assignment of Errors.

The appellants jointly and severally complain and say that there is manifest error in the record of the proceedings, judgment and decree of the District Court and of the Supreme Court of the Territory of Utah, in this, to wit:

The judgment and decree of the District Court is erroneous in that it adjudges that plaintiff recover from defendants the possession of the Antietam Lode and Copper the Ace Lode Mining Claims, and confirms the title of plaintiffs in and to the same; also, in that it further

adjudges and decrees that defendants have no right, title or interest in said mining claims and premises or any part thereof or in the ore extracted therefrom; also, that it adjudges and decrees that said plaintiff is entitled to the seven tons of ore removed by said defendants therefrom; also, that it adjudges that said plaintiff have and recover from the defendants the sum of $1,047.57 damages for ore taken from said mining claims and disposed of, together with the costs of the action; also, that it adjudges and decrees that defendants, etc., be enjoined and restrained from extracting or removing ore therefrom, and that said judgment and decree is erroneous in each and several said particulars and in each and every part of the same, for the reason that said judgment and decree is based upon findings which were reached only by the receiving and consideration as the foundation thereof of improper and illegal testimony as hereinafter specifically stated. And that the Supreme Court of Utah erred in affirming the judgment of the trial Court:

1. Because said trial Court erred in overruling appellants' objection to the introduction of Exhibits C and D, which exhibits are as follows, to wit:

EXHIBIT C.

The undersigned hereby gives notice that he claims 1,500 by 600 feet of this the Copper the Ace Lode, with all the dips, spurs, angles and variations, situated in Carbonate Mining District, Uintah County, Utah Territory. From this tree northeasterly 300 feet, thence southeasterly 1,500 feet, thence southwesterly 600 feet, thence northwesterly 1,500 feet, thence northeasterly 300 feet to the place of beginning.

LEWIS R. DYER.

September 17, 1887.

Recorded at the request of Lewis R. Dyer, this 13th day of February, A. D. 1888, at 10 o'clock A. M., in Book 1 of Records, page 96.

PHIL. STRINGHAM,
Recorder, Uintah County.

EXHIBIT D.

The undersigned gives notice that he claims 1,500 by 600 feet of this the Antiedam lode, with all the dips, spurs, angles and variations, situated in Carbonate Mining District, Uintah County, Utah Territory; from this tree northeasterly 300 feet, thence northwesterly 1,500 feet, thence southwesterly 600 feet, thence southeasterly 1,500 feet, thence northeasterly 300 feet, to the place of beginning.

LEWIS R. DYER.

September 17, 1887.

Recorded at the request of Lewis R. Dyer, this 13th day of February, 1888, at 9 o'clock A. M., in Book 1 of Records, page 95.

PHIL. STRINGHAM,
Recorder, Uintah County.

2. Because the trial Court erred in permitting the witness McLaughlin to testify that the defendant William Haws showed him the Harrison claim.

3. Because the trial Court erred in permitting the witness William McLaughlin to answer the question, "Were you shown any stakes by Mr. Dyer?"

4. Because the trial Court erred in permitting the witness William Donoher to answer the question "Have you or the defendant Haws ever located any mining claims in that vicinity?"

5. Because the trial Court erred in permitting the witness Andrew Johnson to answer the question "Prior to this time, had Mr. Haws told you anything about his intending to take possession of the mine?"

6. Because the trial Court erred in permitting the witness Andrew Johnson to answer the question "Now, what conversation did you have with him or he with you?" (meaning conversation had with Haws about Haw's intention to jump the mine).

7. Because the trial Court erred in permitting the witness Richard Pope to answer the question "While he (meaning Haws) was in the employ of this company (meaning The Victoria Copper Mining Company), did he ever say anything to you as to his intending to jump the claim for relocation?"

8. Because the trial Court erred in permitting the witness E. A. Ferguson to answer the question "How much money has the company (meaning The Victoria Copper Mining Company) expended in working the mine from its organization to the 10th or 11th day of June, 1889?"

9. Because the trial Court erred in disregarding the uncontroverted affidavits of Bocker, Thomas and Cunnington filed in support of the motion to vacate the judgment and grant a new trial.

Wherefore, the appellants pray that the judgment of the Supreme Court of Utah Territory be reversed, and that the said Supreme Court of Utah Territory be ordered to enter a judgment reversing the judgment of the District Court herein.

Argument.

We accept the rule of this honorable Court that on appeals from territorial Courts this Court is not authorized to weigh the evidence or determine its sufficiency to support the conclusions of the trial Court, but that its authority under the act of Congress providing for appeals in such cases is limited to a consideration of questions as to whether or not the Court erred in the admission or exclusion of evidence, etc.

But the authority of this Court being so limited, we not only suggest, but insist that it becomes its imperative duty to scrutinize the several errors assigned more closely than would be its duty were it permitted to examine the entire record with a view to determining whether or not, upon the whole record, the judgment or decree appealed from be just or unjust.

The rule which we invoke in the examination of the several errors assigned is thus stated by Mr. Justice Harlan in *Vicksburg and Meridian Railroad vs. O'Brien*, 119 U. S., page 103:

"While this Court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party." Citing *Smiths vs. Shoemaker*, 17 Wall., 630, 639; *Deery vs. Cray*, 5 Wall., 795; *Moores vs. National Bank*, 104 U. S., 625, 630; *Gilman vs. Higby*, 110 U. S., 47, 50.

The gravamen of this suit was an action at law in the nature of ejectment. The Court sat as a jury, and received and listened to a great deal of evidence which we insist was incompetent. In deciding the case, he in no manner

intimated that he was not influenced thereby. The presumption is that he was influenced by such evidence in the same manner and to the same extent as a jury would have been; otherwise, he would have rejected it when it was offered, or, at least, upon deciding the case, have stated that he then rejected it. It certainly does not appear, beyond doubt, that the errors complained of did not and could not have prejudiced the rights of the appellants.

We will now consider the several errors assigned in the order of their assignment.

POINT I. In neither the complaint nor the findings is there a sufficiently certain and definite description of the property to support the judgment.

We submit that the findings are insufficient to support the judgment. The Utah Statute (2 Comp. Laws, Section 3241) is as follows: "In an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer, upon execution, to identify it."

The eighteenth finding of the Court below is as follows: "That the description of said claims, as given in said addendum notices, is the same description as given in the complaint of the plaintiff herein." The property is described as follows (page 1, printed record): "The Antietam lode mining claim begins at the point of discovery, on the northeast side of the stump of the tree on which the original notice of the Antietam lode was posted, where a post is now set, and running thence, with magnetic courses 27 degrees east, 300 feet to post No. 1; thence north, 72 degrees 20 minutes west, 1,500 feet to post No. 2; thence south, 27 degrees west, 600 feet to post No. 3; thence south, 72 degrees 20 minutes east, 1,500 feet to post No. 4; thence north, 27 degrees east, 300 feet to the place of discovery.

The aforesaid place of beginning, from which the Antietam discovery shaft, seven feet deep, bears north, 27 degrees west, 13 feet distant, and the mouth of the main tunnel, 230 feet long, bears north, 26 degrees 30 minutes east, 219 feet distant.

The plaintiff's title must depend upon what is called the addendum notice, since the description embodied in that notice is found to be the same as the description given in the complaint. The Court can, by an inspection of the description given in the complaint, and above quoted, ascertain whether the location of the plaintiff's Antietam lode was valid. It is obvious that the "description" describes nothing. No point of beginning is established.

Evidence outside of the decree would be required by the officer executing the writ to enable him to determine the location of the stump of the tree so as to establish the northeast side of the tree on which the original notice of the Antietam lode was posted. The description of the Copper the Ace Claim is open to similar objections.

It follows from this that no officer could execute a writ by delivery of any premises described as the Antietam lode is described in this complaint. The necessary result is that, in fact, the judgment of the Court below operates upon no property which can be identified.

POINT II. It was error to admit in evidence Exhibits C and D.

Printed record, pp. 32 and 66.

This was a contest between grantees of conflicting locators of substantially the same mining premises. The burden was upon the appellee to show that in the location of its claims, the alleged locator, Dyer, complied

with the substantial requirements of the Act of Congress of May 10, 1872.

This Court in the case of the *United States vs. Iron Silver Mining Company*, 128 U. S., 673-675, through Mr. Justice Field, who delivered the opinion of the Court, said:

"It is the policy of the government to favor the development of mines of gold and silver and other metals and every facility is afforded for that purpose, but it exacts a faithful compliance with the conditions required."

The Act of May 10, 1872, Rev. Stats., Sec. 2324, among other things, requires that "The location must be distinctly marked on the ground so that its boundaries can be readily traced," and that "All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

It has been repeatedly held that these provisions of the statute are mandatory, and, if not complied with, that the location is invalid and that the claim is subject to a relocation by a third party.

Gleeson vs. Martin White Mining Co., 13 Nev., 442.

North Noonday Mining Company vs. Orient Mining Co., 1 Fed. Rep., 522.

Funk vs. Sterrett, 59 Cal., 613.

Sweet vs. Webber, 7 Colo., 443.

Holland vs. Mount Auburn G. Q. Mining Co., 53 Cal., 149.

Gelcich vs. Moriarty, 53 Cal., 217.

Crœsus Co. vs. Colorado Co., 19 Fed., 78.

Patterson vs. Tarbell (Supreme Court of Oregon), 37 Pac. Rep., 76.

Morrison's Mining Rights (8th Ed.), p. 37, *et seq.*

The controversy hinged entirely upon the questions as to whether Lewis R. Dyer, the alleged locator of the Antietam and Copper the Ace Claims, located the same by posting the alleged notices, and by marking their boundaries upon the ground, as the statute requires.

The first controversy that arose during the trial of the cause was over the question as to whether he had ever posted the location notices. He claimed to have written them originally upon a tree near the point of discovery, which he described. Several other witnesses who were familiar with the location testified that no such tree ever existed. To corroborate his testimony, appellee offered certified copies of notices alleged to have been filed by him and recorded in the Recorder's office of Uintah County, Utah. Defendants objected thereto on the following grounds:

First—That it did not appear that they were filed in any mining Recorder's office.

Second—That there was no law requiring them to be filed in the County Recorders's office.

Third—That the Recorder's certificate thereto was no evidence of the contents of the original, and,

Fourth—Because it appeared that the paper filed in the County Recorder's office was itself a copy of a copy.

The Court overruled the several objections, to which the defendants then and there excepted.

Printed record, p. 32.

These certificates were offered for the sole purpose of corroborating the otherwise unsupported testimony of the witness Dyer. They could have been offered for no

other purpose, for the learned counsel who appeared for the appellee at the trial below, in his brief filed in this Court in support of the motion to dismiss or affirm, on page 7, says:

"The law nowhere requires the recording of a location notice, and in the case *there were no local regulations in force in this mining district at the time of Dyer's location, nor was there a Recorder's office in that mining district.*"

Notwithstanding this theory of appellees' counsel, the Court admitted the certificates of a so-called Recorder over the objection of appellants. They were admitted by the Court for the simple purpose of proving the contents of notices theretofore alleged to have been written upon a tree near the point of discovery. There being no law or local mining regulation in that district in force at the time, requiring them to be recorded, the admission of the recorded copies, for the purpose for which they were admitted, was erroneous. Mr. Greenleaf states the rule, applicable in such cases, thus:

"If the person was bound to record the fact, then the proper evidence is a copy of the record, duly authenticated. But as to matters which he was not bound to record, his certificate, being extra official, is merely the statement of a private person, and will, therefore, be rejected.

1 Greenleaf on Evidence, Sec. 498.

See, also—

Peralta vs. United States, 3 Wall., 434, 440.

United States vs. Buford, 3 Pet., 12, 29.

The Judge who presided at the trial must have deemed the recorded copies to be competent evidence; otherwise, he would have sustained the objection made to the introduction of the Recorder's certificates thereto attached. He found as one of the facts to sustain his

conclusions of law that at the time the claims were located, and also at the time the certificates were recorded, there was no mining district recorder. (See sixth finding, printed record, page 12.) But he did not even then exclude the recorded copies from consideration.

We do not contend that if the original notices had been written upon a tree as claimed, and if it had been shown that they had been destroyed or effaced without the fault of the appellee, it would not then have been competent to introduce secondary evidence of their contents. But this is not the theory upon which the recorded copies were admitted, though it will doubtless be contended that the copies were properly admitted upon the ground that the originals had been destroyed. For several reasons, such evidence, under the circumstances of this case, was objectionable.

First—The witness Dyer testified that they were not copied from the notices written on the tree. His corrected testimony upon that subject was as follows: "I would like to correct the testimony that I heretofore gave as to Exhibits C and D, as to when they were written. The copies made in camp were on a figuring block. When I came to Salt Lake City, I stopped at the White House, and there I copied them on paper about the 1st of February, 1888, in Salt Lake City, and mailed them to Blythe and Mitchell at Vernal, with a request that they be recorded;" (printed record near bottom of page 29.) Copied them from what? Certainly not from the tree on which the original notices are claimed to have been written, nor from the "figuring block," nor even yet from anything else. It is clear from the testimony of this witness that he wrote these certificates, without aid from any source, in Salt Lake City, four and one-half months after he claims

to have written the notices with a pencil on a tree many miles distant therefrom, and to have mailed them to third parties for the purpose of having them placed upon record.

But, if it had been shown that they were copied from the copy made on the figuring block, they would nevertheless have been inadmissible, for, as a general rule, copies of copies are not competent evidence.

Winn vs. Patterson, 9 Peters, 663, 666, 667.

Second—No testimony was offered to show that these recorded copies were true copies of the originals. This was a prerequisite to their introduction.

Smith vs. Connington, 4 Cranch, 62.

Third—The "figuring block" upon which it is claimed the first copies were made was voluntarily destroyed by the witness. One may not voluntarilydestroy written evidence and then introduce secondary evidence.

Renner vs. Bank of Columbia, 9 Wheat., 581.

Fourth—The recorded copies and the recorded certificates were improperly admitted, for the reason that there was no law or custom requiring such notices to be recorded. Cases cited *ante* p. 16.

We should not deem this question of controlling importance had not the appellants introduced strong evidence tending to show that no notices were ever written upon a tree, for the reason that there never was any such tree near the alleged point of discovery as the witness described. Under the peculiar circumstances of this case, only evidence legally competent should have been admitted in corroboration of the testimony of one so vitally interested as "the Vice-President and General Manager of the plaintiff corporation."

POINT III. The District Court erred in permitting the witness McLaughlin to testify that defendant Haws showed him the Harrison claim; also in permitting him to testify that the said defendant showed him a stake which he said was a stake of the Copper the Ace Claim. See printed record, pages 32 and 33.

It was alleged in the complaint and found as a fact by the Court (see sixteenth finding) that prior to the commencement of this suit the defendant Haws had conveyed away all his interest in the mining claims in controversy, and that the same, by divers mesne conveyances, had passed to his codefendants, Michael E. Smith, Samuel R. Whitall, William V. R. Whitall, Edward Keith and Frank A. Keith. Haws was not a necessary party to the suit. He was not even a proper party, though a joint judgment for substantial damages, $1,692.17, was rendered against him and his grantees, for ore removed by the latter. No argument or citation of authorities is needed to show that a party cannot make the declarations of another competent as against third parties by simply making him a party to the suit. Upon no other theory that we can imagine were the declarations of the defendant Haws, made at the time they are alleged to have been made, admissible against his grantees.

No charge was made nor was any evidence introduced to establish the existence of any combination to defraud on the part of Haws and his codefendants who owned the property and held the record title at the time the suit was brought.

When a fraudulent combination is charged the rule is, "that such declarations are not admissible against the vendee, unless the alleged common purpose to defraud is first established by independent evidence, and unless they

have such relation to the execution of that purpose that they fairly constitute a part of the *res gestæ*."

Winchester & Partridge Manf. Company vs. Creary, 116 U. S., 161, 166.

But where none is charged, such evidence is not admissible under any circumstances.

Even had such a purpose to defraud been alleged and established by independent evidence, it could not have formed a part of the *res gestæ*, or have been admissible as against the holders of the record title, for the witness testified that the conversation he had with Haws at the time the latter is alleged to have shown him the stakes, took place in June or July, 1888, while it is not pretended that Haws set up any claim to the property until "on or about the 10th day of June, 1889."

Nor were they admissible under the rule which, for certain purposes, sometimes admits the declarations of a grantor as against a subsequent grantee. For, first, Haws was not then in possession and was not then claiming title, and, second, they were not introduced to show the character of his possession, or by what title he then held, but were introduced for the purpose of destroying a title subsequently acquired by him, and which had been thereafter, by divers mesne conveyances, acquired by certain of his codefendants.

The rules under which such declarations are admitted are thus stated by this Court:

"The declarations of a party in possession of land are competent evidence — First, as against those claiming under him; second, such declarations are competent only to show the character of the possession of the person making them, and by what title he holds, but not to sustain or destroy the recor title."

Dodge vs. Freedman's Savings and Trust Co., 93 U. S., 379, 383.

At the time the alleged declarations were made, Haws was not in the possession of the lands, nor was he then making any claim whatever thereto. The effect of admitting them was to destroy the record title of subsequent grantees. Upon both of these grounds we think they were inadmissible.

For the same reasons, we think the Court erred in admitting certain testimony given by the witness William Donoher.

This witness was asked whether Haws had not previously located other mining claims in that vicinity. Upon objection being made in behalf of the other defendants, appellee's counsel stated "that he wished to show that Haws had, prior to the relocation of the plaintiff's claims, located claims adjoining those claims, *and in that way recognized their existence.*" The witness then answered: "Yes, sir, he located one called the Harrison. It joins on the east end of the Copper the Ace. At the time of locating that claim, we measured from what we supposed was the discovery point of the Copper the Ace 1,500 feet," etc.

Printed record, p. 36.

POINT IV. The District Court erred in permitting the witnesses Johnson and Pope to testify as to conversations had with Haws relative to his intention to take possession of the mines.

(See the fifth, sixth and seventh assignment of errors and printed record, pp. 39, 40 and 41.)

We forbear argument, for upon what theory the declaration of a vendor made before he acquires any title to lands as to how he expects to acquire title or gain possession, are binding upon his subsequent grant-

ees who were not present and who hold the record title, passes our comprehension or imagination.

We submit the question to appellee's counsel for answer.

POINT V. The District Court erred in permitting the appellee to prove that it had expended between seven thousand and eight thousand dollars, in working the mine from the time it took possession thereof until it was ousted therefrom by the defendant Haws.

Printed record, p. 42.

As stated by counsel, this testimony was offered "to show the good faith in working the property by the plaintiff company," and it is to be presumed that the Court received it for the same purpose for which it was offered, and that his judgment was influenced thereby accordingly.

This question was not in issue, and should not have had any influence whatever upon the Court trying the cause.

But who is able to say that it did not?

The question was: Did the company's grantor comply with the Act of Congress by posting the notices and by properly marking the boundaries of his claims upon the ground so that they might be readily traced at the time or within a reasonable time after he located them?

How could the subsequent expenditure of money by his grantee throw any light whatever upon this disputed question?

We also submit this question to appellee's counsel for answer.

POINT VI. The locations of the Antietam and the Copper the Ace claims were void.

Neither the locator, Dyer, nor the appellee ever obtained a right to the ground in question. We make this

assertion because it appears upon the record proper that both the Antietam and the Copper the Ace claims were located, if at all, from the same discovery point. This point is fixed by the complaint (pages 1 and 2) as the point "from which the mouth of the main tunnel, 230 feet long, bears north twenty-six degrees, 30 minutes east, 219 feet distant." The trial Court, in its third conclusion of law, as well as in its judgment (pages 15 and 16), refers to the description given in the complaint as fixing the boundaries of the ground in question. That the notices, if posted at all, were posted at the same point, is also shown by the testimony of the plaintiff's witnesses Dyer (page 25), Shaw (pages 30 to 32), and Ferguson (page 4), and by Exhibits C and D.

This attempt to evade the provisions of Section 2320, U. S. Rev. Stats., and to locate two full claims from one discovery, is a palpable fraud upon the United States, and can give to the locator no right to either claim, especially in the absence of proof as to which location, if either, is valid.

McKinstry vs. Clark, 4 Mont., 370.
Hauswirth vs. Butcher, 4 Mont., 299.
Leggatt vs. Stewart, 5 Mont., 197.

There is no allegation to support the finding that Dyer ever discovered any vein or lode.

But in order to maintain the action, the plaintiff must show that prior to his location he discovered a vein or lode within the limits of the claim located. (Rev. Stats., 2320.) If, therefore, no discovery was in fact made, or, what is the same thing, if the plaintiff has not pleaded such discovery, there is no valid location, and no rights against the United States are obtained. But in order to maintain the action, it is incumbent on the plaintiff to show that it was the owner of a valid and subsisting

location of the lands in dispute superior in right to that ofthe defendants.

"The plaintiff's location must be one which entitles him to possession against the United States as well as against another claimant. If it is not valid as against the one, it is not good as against the other. The location is the plaintiff's title. If good, he can recover; if bad, he must be defeated.

A location on account of the discovery of a vein or lode can only be made by a discoverer or one who claims under him."

Gwillim vs. Donnellan, 115 U. S., 45—50.

But even if there were a foundation in the pleadings to support the first finding of fact (page 11) that Dyer "discovered and appropriated or mineral vein a lode of rock in place" or the second finding that "at the time of the discovery of said vein or lode and the location of said mining claims the land included within the boundaries of said mining claims was public mineral land," it is, nevertheless, perfectly evident that there was only one discovery, and that Dyer never became thereby entitled to locate two full claims each of 1,500 feet in length. The policy of the mining laws, while liberal toward the prospector, is evidently to give one claim of a certain length and width for each discovery. If the prospector by explorations along the line of the vein make a second discovery on the public domain, he may locate a second claim, but he cannot have two claims for one discovery.

Again, the discovery, to be the basis of a location, must be made within the limits of the claim located. (Rev. Stats., 2320.) It is impossible to hold that the discovery point of the two claims involved in this case was within the boundaries of both. In fact, it was within the

boundaries of neither, but lay on the line dividing the Antietam from the Copper the Ace.

POINT VII. The District Court erred in disregarding the affidavits filed in support of the defendant's motion for a new trial.

We are aware of the doctrine of this Court that the allowance or refusal of a new trial rests in the *sound* discretion of the Court to which the application is addressed, and that the result cannot be made the subject of review by this Court.

But we entertain the opinion that when the Court below does not exercise a "sound" discretion or is guilty of an abuse of discretion, that this Court will correct the error. Such, in effect, was the rule announced in *Clyde Mattox vs. United States*, 146 U. S., 140, 147. The only difference between that case and the one at bar is that, in the case referred to, the Court excluded the affidavits, while in this case he simply ignored them. We insist that he exercised no discretion whatever—certainly no sound discretion—in respect to the matters stated therein, for, had he done so, he must have vacated the judgment upon the ground that the same was obtained by a fraud practiced upon the Court itself, as well as upon the appellants. The fraud so practiced was, in effect, the fraud of the company itself. Dyer was its principal witness, and without that part of his testimony which by the affidavits was shown to have been willfully and corruptly false, its case must have failed. The power is inherent in all Courts of record to set aside judgments obtained by fraud or by the perjury of the party in interest.

It is not easy to conceive of a balder case of fraud practiced upon a Court, or a more willful and corrupt case of perjury, than that disclosed by the uncontradicted and

unimpeached affidavits filed in this case. Think of it! After the judgment was rendered, the plaintiff's Vice-President and General Manager, upon whose testimony alone it was obtained, said to Henry Cunnington, boastingly, that he had deceived the Court, and that, although the Antietam and Copper the Ace claims were not, in fact, staked, that he was no fool; that he had gotten the ground anyhow, and made the Court believe that they had been staked.

Printed record, p. 19.

To Thomas F. Thomas he said "that the truth was that he did not set any stakes in locating said claims; that he didn't have time, and didn't think anybody would interfere with him, and that William Rankin did not assist him to set any stakes; that it didn't matter whether he set any stakes or not, he expected to make a good deal of money out of the fight."

Printed record, pp. 18.

This affiant was corroborated by Charles W. Bocker, who was present and heard the conversation.

Printed record, p. 17 and 18.

What shall be said of the sense of justice of any Court that will allow a party to depart from its precincts with the fruits of a victory so obtained while it yet has the power to right the wrong? Ought not the party rather to have been held upon a bench warrant for the crime of perjury, no denials or explanations having been made?

Suppose that the facts contained in the affidavits had been set up in a bill in equity filed for the purpose of having the judgment set aside; that an answer under oath had been filed, denying the allegations of the bill, and that these three affiants had been called as witnesses in its support, and that no evidence had been offered in

support of the answer, and that the Court below had dismissed the bill, and that the case had then been brought here on appeal, what disposition would this Court make of it? Judging from its decisions in kindred cases, we should say that a decree for the plaintiff would be ordered.

In *Metcalf vs. Williams*, 104 U. S., 93, which was a suit in equity to set aside a judgment at law, the Court, page 95, said:

"When a party has been deprived of his right by fraud, accident or mistake, and has no remedy at law, a Court of equity will grant relief. Perhaps, in view of the equitable control over their own judgments which Courts of law have assumed in modern times, the judgment might have been set aside on motion for the cause set forth in the bill. But if this were true, the remedy in equity would still be open, and the fact that the Court declined to exercise the power, upon motion, rendered the resort to a bill necessary and proper."

In *Johnson vs. Waters*, 111 U. S., 640, 667, it said: "In such cases, the Court does not act as a Court of review, nor does it inquire into any irregularities or error of proceedings in another Court; but it will scrutinize the conduct of the parties, and, if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it."

In the case of *Arrowsmith vs. Gleason*, 129 U. S., 86, 100, the Court quoted with approval the following from the opinion of the Court in *Reigal vs. Wood*, 1 Johns. Chan., 402, 406. "Relief is to be obtained not only against writings, deeds, and the most solemn assurances, but against judgments and decrees, if obtained by fraud or imposition." Also the following from *Bowen vs. Evans*, 2 H. L. Cas., 257, 281: "If a case of fraud be established, equity will set aside all transactions founded upon it, by

whatever machinery they may have been effected, and notwithstanding any contrivances by which it may have been attempted to protect them. It is immaterial, therefore, whether such machinery and contrivances consisted of a decree of equity, and a purchase under it, or of a judgment at law, or of other transactions between the actors in the fraud. The Court concluded its opinion by saying that:

"As this case is within the equity jurisdiction of the Circuit Court, as defined by the Constitution and laws of the United States, the Court may, by its decree, lay hold of the parties and compel them to do what, according to the principles of equity, they ought to do, thereby securing and establishing the rights of which the plaintiff is alleged to have been deprived by fraud and collusion."

In the more recent case of *Marshall vs. Holmes*, 141 U. S., 589, 599, 600, certain judgments had been obtained against Mrs. Marshall by one Mayer in one of the District Courts of Louisiana. She had filed, in the Court in which they were rendered, a petition to be relieved against them, upon the ground that they had been obtained against her by the perjury, forgery of a letter and fraud on the part of the said Mayer, and she had afterwards filed a petition, accompanied by a proper bond, to have her suit removed into the Circuit Court of the United States, upon the ground of the diverse citizenship of the parties, which was denied and the judgments afterwards sustained. This Court, in passing upon the sufficiency of her petition and of her right to have the cause removed into the Circuit Court of the United States, among other things, after quoting from its former decisions, said:

"These authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cogni-

zance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained in the Court of another jurisdiction. While it cannot require the State Court itself to set aside or vacate the judgments in question, it may as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting the Court of the United States from granting a writ of injunction to stay proceedings in a State Court. It would simply take from him the benefit of judgments obtained by fraud."

It will thus be seen that the Court has ever set its face like flint against permitting a party to enjoy the fruits of his fraudulent conduct, even though such conduct had resulted in his obtaining a judgment or decree of a Court of record. For this purpose it entertained independent suits in all of the cases above cited to set aside judgments or decrees, rendered in State Courts. For a stronger reason, should it protect the rights of a party who appeals directly from the judgmentof a Court under its immediate supervision, and whose judgments and decrees it is made its duty to review, when it appears that the opposite party has, by means of fraud and willful and corrupt perjury obtained against him the judgment appealed from.

The appellants could not guard against the perjury of the appellee's Vice-President and managing officer; nor could they successfully expose it until he, himself, revealed it by confession. Application was at once made to the Court for relief by the filing of a motion for a new trial, supported by the affidavits to which we have referred. The term of the Court at which they were ren

dered not having expired, this was the only proper course to pursue. The Court below should, in our opinion, have granted the proper relief by allowing the motion. Having refused to do so, the case is now before this Court on appeal. It has the unquestioned power to do justice between the parties by granting some form of relief. We believe that it will not permit a party to enjoy the benefits of a judgment obtained by confessed perjury. We only suggest the form of relief which may be granted. The Court may, without contravening the rule which it has already established, order a new trial upon the ground that the Court in denying the motion therefore did not exercise a "sound," or any, discretion, in totally ignoring uncontradicted affidavits, as in the *Clyde Mattox* case, *supra*.

Or it may treat the motion as a petition filed in the cause for relief against the judgment, and the affidavits as evidence offered in support thereof. Equity does not regard form, but, independent thereof, will grant that relief which will do justice between the parties.

Courts of law in such matters are governed by the same rule.

Respectfully submitted.

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October, 1895.

Frederick D. McKenney
of Counsel.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

No. 66.

WILLIAM HAWS, HEBER TIMOTHY, EDWARD W. KEITH, ET AL., APPELLANTS,

vs.

THE VICTORIA COPPER MINING CO.

Memorandum of Points on Oral Argument for Appellant.

An appeal or writ of error lies to this Court direct from the judgments or decrees of the supreme courts of the Territories except in the classes of cases where by the express provisions of the act of March 3, 1891 (26 Stats., 826), the judgments of the circuit courts of appeals are made final.

Shute *vs.* Keyser, 149 U. S., 649, 651.

Under its rules of practice this Court, while providing penalties for a failure to assign errors, as required by section

997, Revised Statutes of the United States, nevertheless reserves to itself the right to "notice a plain error not assigned or specified."

If, therefore, a plain error, apparent on the face of the record, fails of assignment, it would seem not to be amiss in counsel to call attention to it at the argument in order that the Court may exercise its right in such behalf reserved.

By section 2320 of the Revised Statutes of the United States it is provided that—

> "A mining claim located after the 10th day of May, A. D. 1892, * * * shall not exceed one thousand five hundred feet in length along the vein or lode; *but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.*"

Without prior *discovery* no legal location of any mining claim can be made, and in the absence of a valid legal location no possessory or other right in the claimed premises inures to the claimant either as against the United States or another claimant or even against a mere prospector.

As this action is "ejectment," the plaintiff mining company must recover, if at all, on the strength of its own title and not on the weakness of its adversary. To entitle it to recover it is incumbent upon it to show a legal location of the lands in controversy by averring and proving, if traversed, a *discovery* prior to location.

The complaint is defective in this particular, and would doubtless have been held bad on demurrer.

The failure to enter a demurrer in nowise operates to cure

or waive the defect, for discovery is a statutory prerequisite to a legal location.

Nor is the defective averment cured by proof, for in the "statement" of the case, which the Utah statutes (sec. 538, Compiled Laws of Utah, 1888) "constitute the record to be used on appeal from the order granting or refusing a new trial," there does not appear a scintilla of testimony tending to prove a "discovery" by the plaintiff company or its grantors prior to location, or, indeed, prior to the institution by Haws of his adverse claim.

The record before the supreme court of the Territory and now before this Court, in addition to being signed by the trial judge, is certified by the counsel for the respective parties to be "a correct transcript of the record in the case."

In the absence of *any* evidence tending to show a "discovery" it is clearly reversible error on the part of the trial judge, who seems to have appreciated the fatal defect, both in the pleadings and in the proof, to find—

> "First. That Lewis R. Dyer, the locator * * * at and prior to the time of locating * * * discovered and appropriated a mineral vein or lode of rock in place."

This is not a matter of weighing evidence or determining its sufficiency. It is a case of the total absence of evidence.

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